Supreme Court, U.S.
FILED
AUG 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-179

No. 86-

IN THE

Supreme Court of the United States

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,
UNITED STATES OF AMERICA,
Intervenor,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Congress acted unconstitutionally when it amended Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, to permit religious employers to hire only members of their own faith, regardless of the nature of the employment activity, thus making it unnecessary for federal courts to decide whether particular employment activities of religions are in fact religious?

2. Whether, when an Act of Congress is declared unconstitutional, a court may award damages against an employer who relied upon the plain language of the statute in setting conditions of employment?

PARTIES

In addition to the parties set forth in the caption, the following are parties to this action:

1. *Plaintiffs*

Judy Bawden	Arthur Frank Mayson
April Joyce Riding	Ruth Arriola
Deniece Kanon	Shelleen Adamson

Ralph L. Whitaker has no interest in this appeal because the District Court determined that he was properly discharged from his employment. No final judgment against Mr. Whitaker has been entered.

The plaintiffs purported to bring their claims on behalf of a class. No motion to certify a class has been filed.

2. *Defendants*

The Corporation of the President of The Church of Jesus Christ of Latter-day Saints

STATEMENT REQUIRED BY RULE 28.1

The Corporation of the President of The Church of Jesus Christ of Latter-day Saints is a corporation sole organized under the laws of Utah and incorporates the office of the presiding spiritual leader, the President, of The Church of Jesus Christ of Latter-day Saints. *See* Utah Code Ann. §§ 16-7-1 to 12. The Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints incorporates the office of the Presiding Bishop, who is another ecclesiastical leader of the Church. As corporations sole, the appellants do not issue stock and have no parent corporations. They are "affiliated" with each other because of the relationship between Church ecclesiastical offices. The corporations sole are not profit-making entities, but they have wholly-owned subsidiaries. The Corporation of the President has substantial ownership in the following corporations:

Heber J. Grant & Company
Zions Cooperative Mercantile Institute

STATEMENT PURSUANT TO RULES 28.4(b) AND 28.4(c)

Pursuant to Rule 28.4(b), the Appellants state that the United States District Court for the District of Utah has certified this matter pursuant to 28 U.S.C. § 2403(a) to the Attorney General of the United States. The United States has intervened as a party and has filed a notice of appeal.

Pursuant to Rule 28.4(c), the Appellants state that the United States District Court for the District of Utah has certified this matter pursuant to 28 U.S.C. § 2403(b) to the Attorney General of the State of Utah, who has declined to intervene as a party or to participate as amicus curiae.

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THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The District Court's Memorandum Decisions and Orders dated January 11, 1984 (App. A, 1a-82a) and September 18, 1985 (App. C, 88a-122a) are reported *sub nom. Amos* v. *Corporation of Presiding Bishop* at 584 F.Supp 791 and at 618 F.Supp 1013.

JURISDICTION

The Final Judgment of the District Court was entered on May 16, 1986. Notices of Appeal were timely filed in the District Court by the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints

("CPB") and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints ("COP") on June 9, 1986 (App. 130a), and by the United States on June 12, 1986. This Court has jurisdiction of this direct appeal under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the United States Constitution provides in pertinent part that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides that it shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Section 702 of the Civil Rights Act of 1964 (unamended), formerly codified at 42 U.S.C. § 2000e-1, provided:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corpora-

> tion, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities.

The 1972 amendment to Section 702, codified at 42 U.S.C. § 2000e-1, provides:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Excerpts from the Utah Code Annotated are set forth at App. 132a.

STATEMENT OF THE CASE

The appellants seek review of a judgment of the United States District Court for the District of Utah, which has invalidated a key provision of Title VII of the Civil Rights Act of 1964. As originally enacted in 1964, Section 702 of that Act provided that religious employers may restrict their employment to "individuals of a particular religion to perform work connected with ... [their] religious activities...." In 1972 Congress deleted the word "religious," thereby broadening the exemption to permit religious employers to hire "individuals of a particular religion" (*i.e.*, members of their own faith) regardless of whether the work to be done could be categorized as "religious."

The District Court has held the 1972 amendment unconstitutional as applied to employment activities which

are not "religious." Thus, it has effectively held that the qualification in the 1964 version was constitutionally required.

1. The appellants administer certain programs of The Church of Jesus Christ of Latter-day Saints ("Church").[1] Among the activities operated by the Church are Deseret Gymnasium ("Deseret") and Beehive Clothing Mills ("Beehive"). Deseret is an unincorporated, Church-owned, tax-exempt and subsidized facility which was founded by the Church to provide its members with wholesome, Church-supervised exercise and recreation at facilities where the Church's moral and health standards are observed. Deseret makes its facilities available to the public and to charitable groups and therapy patients. Beehive is an unincorporated, Church-owned, tax-exempt and subsidized operation which manufactures required religious garments and ceremonial clothing used in the Church's temples.

The Church has a policy of employing only Church members who are eligible for temple recommends.[2] The appellees are former employees who failed to meet the recommend requirement.

2. The original plaintiffs, former employees at Deseret and Beehive, filed their complaint on April 4, 1982.[3] They

[1]The Church is also known as the LDS or Mormon Church. The appellant COP serves as the primary employing entity for the departments and divisions of the Church. The CPB holds title to a number of Church facilities, including those where the appellees were employed.

[2]The temple recommend signifies that its possessor is eligible to enter the Church's temples, where certain sacred ceremonies are performed. Since temple recommends are issued only to members who observe Church religious standards, they afford an administratively convenient means of identifying those who qualify for Church employment.

[3]The case was brought as a class action but has never been certified as such.

challenge the constitutionality of Section 702's exemption for religious employers and a similar exemption granted by a Utah statute similar to Title VII.[4]

The appellants moved to dismiss the complaint, admitting that the appellees had been terminated solely because of their ineligibility for temple recommends and relying on Section 702's exemption. In a decision issued January 11, 1984, the District Court concluded that, as amended in 1972, Section 702 applies to all church employment,

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[4]In comparing the Utah statute with Title VII the District Court observed that "Section 34-35-6 of the Utah Code similarly prohibits an employer from engaging in a number of discriminatory employment practices. Among the various prohibitions, Utah has made it unlawful:

> For an employer to refuse to hire, to discharge, to promote, demote, or to discriminate in matters of compensation against any person otherwise qualified, because of race, color, sex, age, if the individual is 40 years of age or older, religion, ancestry, national origin, or handicap.

Utah Code Ann. § 34-35-6(1)(a) (Supp. 1983)." 594 F.Supp. at 797, App. 6a-7a.

The District Court further observed that "Utah has exempted religious entities from the coverage of its antidiscrimination act by excluding them from the definition of employer:

> 'Employer' means the state or any political subdivision or board, commission, department, institution or school district thereof, and every person employing 25 or more employees within the state; but does not include religious organizations or associations, religious corporations sole, nor any corporation or association constituting a wholly owned subsidiary or agency of any religious corporation or association or religious corporation sole, a bona fide private membership club (other than a labor organization)."

Id. at 798, App. 7a-8a, *quoting* Utah Code Ann. § 34-35-5, App. 132a.

religious and non-religious[5] (594 F.Supp. at 805, App. 24a), but held the 1972 amendment to be an unconstitutional establishment of religion as applied to employment in non-religious activities.[6] *Id.* at 804-26, App. 20a-70a. The District Court developed its own test to determine whether a given activity is or is not religious. *Id.* at 799, App. 10a-11a.

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[5]The District Court's interpretation of the 1972 amendment as granting religious employers an unqualified exemption to hire their own members for any purpose is clearly correct, as borne out not only by the change in the statutory language, but also by the legislative history. The Conference Committee explained that the amendment expanded the exemption for religious organizations with respect to religious discrimination "in all their activities instead of the present limitation to religious activity." *Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 History")*, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 2nd Sess. 1814 (joint explanatory statement of conference managers). And Representative Erlenborn, one of the House managers of the conference bill, characterized the provision before the full House as "a broad exemption for anyone employed by the religious institutions rather than only those people who might be used in religious work per se," (*1972 History* at 1858-59), adding that such a religious institution was to be exempt even if engaged in a "profit-making venture". The amendment's chief opponent, Senator Williams, also confirmed its scope just before the Senate approved it by voice vote. *1972 History* at 1665-66 (February 21, 1972).

[6]In *King's Garden, Inc.* v. *Federal Communications Commission*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974), the Court of Appeals for the District of Columbia Circuit stated in dictum that, "The 1972 exemption is of very doubtful constitutionality," (*id.* at 53), but that issue was not before the court in that case, which involved solely a construction of the FCC's employment discrimination regulations. *See also Feldstein* v. *Christian Science Monitor*, 555 F.Supp. 974 (D. Mass. 1983). *Collins* v. *Porter Memorial Hospital*, Civ. No. 86-A-1229, now pending in the United States District Court for the District of Colorado, raises the same issue as the one presented by this appeal. (A nurse formerly employed in a hospital operated by the Seventh Day Adventist Church claims that she was dismissed because she is not a Seventh Day Adventist.)

Applying this distinction between religious and non-religious employment, the court held Section 702 to be invalid as applied to employees at Deseret, whose activities the court classified as non-religious.[7] 594 F.Supp. at 799-802, App. 9a-18a. The District Court concluded that it needed more information in order to make the determinative finding whether the activity at Beehive was religious or non-religious. 594 F.Supp. at 802-03, App. 16a-20a.

The appellees did not seek immediate entry of judgment in favor of Arthur Frank Mayson, the only plaintiff formerly employed at Deseret. Instead, they amended the complaint to add a new plaintiff, Ralph L. Whitaker, who had been employed at Deseret Industries ("Industries"). Industries is an unincorporated, tax-exempt and subsidized component of the Church's welfare program. 618 F.Supp. at 1022, App. 104a-107a. Industries hires and trains certain unemployed, handicapped and retarded members of the Church by, *inter alia*, refurbishing and selling used items. *Id.* The appellees sought and the District Court ordered extensive discovery concerning the world-wide manufacture and distribution of religious garments and the nature, religious bases, personnel policies, and job descriptions at Deseret, Beehive, and Industries.

On September 18, 1985, acting on the appellees' motion for summary judgment, the District Court reaffirmed its holding that Section 702 cannot constitutionally be ap-

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[7]With regard to the Utah law, the District Court stated:

> In discussing the plaintiffs' claims of unconstitutionality, the court will only discuss Section 702 because the determination regarding the federal law applies with equal force to the state exemption as it relates to the facts of this case.

594 F.Supp. at 798, App. 8a.

plied to Mr. Mayson's job at Deseret. 618 F.Supp. at 1027 App. 116a. The District Court denied summary judgment with respect to Beehive, stating that it needed still further information about any past hiring of non-members or ineligible members and about foreign garment manufacture and supply. *Id.* at 1020-22, App. 101a-105a. The District Court also entered summary judgment in appellants' favor with regard to Industries, which it concluded was sufficiently religious to pass its test of what is a religious activity. *Id.* at 1027, App. 116a. The District Court awarded back wages, fringe benefits, retirement contributions, and reinstatement to Mr. Mayson. *Id.* at 1027-29, App. 116a-120a.

On February 5, 1986 the District Court vacated its judgment and certified the case to the Attorney General of the United States and to the Utah Attorney General pursuant to 28 U.S.C. § 2403. The United States intervened and filed a brief urging the District Court to reverse its earlier holdings. The Utah Attorney General declined to intervene or participate as amicus curiae. On May 16, 1986, the District Court entered an order and judgment reaffirming its earlier holdings and granting final judgment for Mr. Mayson. App. 87a. This appeal followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In 1972, following eight years of experience with Title VII, Congress amended Section 702 to make it unnecessary for federal courts, in deciding employment discrimination cases, to distinguish between religious and non-religious activities. The District Court has held this amendment unconstitutional and has created a new test that requires broad scrutiny of the tenets, rituals and administrative practices of religions for the purpose of determining what is and what is not "religious." The decision, which falls squarely within this Court's direct appellate

jurisdiction, will affect most, if not all, of the nation's churches. The questions presented are substantial and must be reviewed by this Court.

1. The District Court should have resolved this case without ever reaching the Establishment Clause issue. Neither the three-pronged test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), nor any other Establishment Clause test was triggered by Congress' amendment of Section 702. If Congress had not enacted any prohibition against employment discrimination in interstate commerce, this suit could never have been brought. The appellees' complaint, then, is properly addressed to Congress for its refusal to go as far as the appellees would have liked.

It is well settled that in any given area, Congress can exercise less than the full extent of its power to regulate interstate commerce. *See Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178 (1946); *Currin* v. *Wallace*, 306 U.S. 1 (1939); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). Section 702 is an integral part of Congress' total statutory effort to prevent employment discrimination based on race, color, sex, national origin, or religion. If, as occurred here, Congress chooses to prohibit some religion-based employment discrimination, but stops short of what it could arguably have prohibited under the Constitution, Congress does not thereby exceed its constitutional powers.

Prior to 1964, there was no federal employment discrimination law, and Congress was under no constitutional obligation to enact one. Congress could have exempted religious employers entirely from Title VII, just as it exempted itself. 42 U.S.C. § 2000e-16; *see also, Davis* v. *Passman*, 442 U.S. 228 (1979). Instead, Congress gave religious employers a partial exemption. The 1964 exemption permitted them to hire their own members in their religious activities, and in 1972, Congress enlarged the ex-

emption by eliminating the requirement that a religious purpose of the employment be proven.

The net effect of the 1972 amendment was to alleviate Establishment Clause problems.[8] The 1965 version of Section 702, which required federal courts to entangle themselves in such questions as (1) what are the employing church's beliefs and practices? (2) do they qualify as genuinely religious? and (3) what is the likelihood that the means chosen by the church will in fact achieve its religious objectives (here, contributing to the Church's objective of caring for the needs of its own members)?[9]

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[8]When it enacted Title VII, Congress had three options concerning religious preferences by religious employers. Two are represented by the 1964 and 1972 versions of Section 702. The third would have been to eliminate Section 702 altogether. The alternative eventually selected is the only one that does not raise serious constitutional questions. As noted in the text, the 1972 amendment alleviated entanglement problems that arose out of the 1964 version. And the constitutional problems resulting from the complete elimination of Section 702 would have been even more severe, because that would have left churches with no discretion to favor their own members for any position, including those that are central to the achievement of religious objectives. Even the District Court recognized that an exemption for "religious" activities is not only permissible, but required by the Free Exercise Clause. 594 F.Supp. at 818, App. 53a-54a.

[9]The District Court concluded that Industries was sufficiently religious because of the Church's doctrinal welfare objectives. The District Court ignored the fact that the Church's welfare and religious objectives far exceed the scope of Industries and include caring for all the needs of its members. The Church is certainly entitled to conclude (as it has concluded) that one effective way to provide for its members' needs is to keep them employed. *See* App. 109a-110a. It would also seem obvious that the Church may rely on its own resources as an employer for those purposes. Whether the objective of providing for its members' needs is sufficiently religious and whether using the Church's employment resources for the benefit of its own members furthers its objectives are judgments that are more appropriately made by the appellants than by a court. In any event, Congress has decided that these are the kinds of issues into which courts should not intrude.

Whether federal courts can constitutionally decide such issues is highly doubtful. *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 501-04 (1979). It is well established, for example, that a federal court must not become involved in resolving church property disputes where the very act of rendering judgment would require the court to pass on matters related to church doctrine. *Presbyterian Church* v. *Hull,* 393 U.S. 440 (1969). Similarly, churches have the constitutional right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952); *see also Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696 (1976).[10]

Fortunately, courts need not decide such issues. In 1972, Congress took judges out of that business, so that the serious constitutional questions presented by the 1964 Act need not be reached. Surely it fell within Congress' power to make the change that made it unnecessary for courts to decide which of a church's programs are religious and which are not.

Viewing the 1972 amendment as lessening statutory civil rights protection otherwise available does not change the result. In *Crawford* v. *Board of Educ. of City of Los Angeles,* 458 U.S. 527 (1982), this Court held that the Constitution is not violated when a state first requires mandatory busing to achieve racial balance in the public schools — though under no federal constitutional obliga-

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[10]In an analogous context, federal criminal cases cannot be pursued where they would necessarily require decisions concerning the validity, truthfulness or propriety of a church's practices or beliefs. *United States* v. *Ballard,* 322 U.S. 78 (1944). *Cf. Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.,* 106 S.Ct. 2718 (1986) (Stevens, J., concurring).

tion to do so — and then later rescinds that obligation through amendment to its state constitution.[11] Here, as in *Crawford,* the Constitution does not preclude the appropriate governmental policymakers from exercising less than the total measure of anti-discrimination authority arguably available to them or from establishing an initial threshold of anti-discrimination protection and then receding from that threshold.

In short, First Amendment values were strengthened, not infringed, by the 1972 amendment, which was a sensible congressional effort to avoid constitutional problems.[12] While this Court has the ultimate responsibility to interpret the Constitution, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), members of Congress also have a duty to uphold its principles. Efforts by Congress to tailor its lawmaking efforts to relieve constitutional concerns that Congress itself has indentified are entitled to deference. *United States* v. *Nixon*, 418 U.S. 683, 703 (1974); *see also, Patsy* v. *Board of Regents of State of Florida,* 457 U.S. 496, 504 (1982).

The District Court, however, denied Congress any discretion whatsoever in this area where constitutional concerns must be balanced. It held that while an exemption as to "religious" activities was required by the Free Exercise Clause, any expansion beyond that bare

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[11]California's state constitution had earlier been interpreted to prohibit *de facto* segregation as well as *de jure* (that is, the California constitution prohibited any desegregation condition regardless of the cause). California voters later amended their constitution essentially to conform to the federal requirements.

[12]Congress' amendment preserved not only Establishment Clause values but also Free Exercise values, such as the right of church members to reserve for themselves and their leaders decisions concerning what their religious objectives will be and how they can best achieve those objectives.

minimum was forbidden by the Establishment Clause.

2a. Assuming the applicability of the Establishment Clause, the District Court erred in its wooden application of the three-part test derived from *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971).

The relevant First Amendment issue is whether there is an establishment of religion. Obviously, inquiries into the purpose of the statutory scheme, its effects, and its resulting entanglements between church and state can be helpful in determining whether the constitutional prohibition has been violated. But, as recent decisions of this Court have made clear, the *Lemon* test is not a ritualistic checklist.[13] It is, rather, a guide to assist in determining whether, in any particular case, government has established a religion. In cases where other more helpful indicia are available, this Court has decided Establishment Clause challenges without reference to the *Lemon* test. *Marsh* v. *Chambers,* 463 U.S. 783 (1983); *Larson* v. *Valente,* 456 U.S. 228 (1982).[14]

The reasons that the *Lemon* test is singularly inappropriate here are not identical to the prevailing considerations in *Marsh* or *Larson*, but they are equally compelling.

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[13]"These tests 'must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired.' " *School Dist. of City of Grand Rapids* v. *Ball,* 105 S.Ct. 3216, 3222 (1985), *quoting in part, Meek* v. *Pittenger,* 421 U.S. 349, 359 (1975).

[14]In *Marsh*, this Court held that a state legislature's practice of opening each session with prayer did not violate Establishment Clause principles. In *Larson*, this Court struck down a state statute which required reporting and registration of those religions which solicited more than 50% of their funds from non-members. In neither case did the Court apply the *Lemon* test.

As at least one member of this Court has recognized, it makes little sense to seek a purely secular purpose and effect in laws designed to accommodate religion, since such laws are religion-conscious by nature. *See Wallace* v. *Jaffree,* 105 S.Ct. 2479, 2504 (1985) (O'Connor, J., concurring).

Even more important here, however, is the constitutional concern of church/state entanglement. It is a different kind of entanglement from that which the Court has considered in the parochial school aid cases, the birthplace of the *Lemon* test. The entanglement problem here is a judicial entanglement. The District Court has effectively held that the 1964 version of Section 702 was the only constitutionally acceptable one, and has thereby imported as a First Amendment *requirement* the very deficiencies in the 1964 version that made it constitutionally suspect. Applying the *Lemon* test in all its rigidity and adding a new three-step test of its own, the District Court has examined three Church programs to determine whether they are sufficiently religious. And with what results? For Title VII purposes, it is sufficiently religious for the Church to assist its unemployed, handicapped and retarded members, but not to operate a gymnasium in accord with the Church's health and moral standards. Whether the manufacture of required religious garments is sufficiently religious awaits further District Court analysis of both foreign and domestic Church activities.

To determine whether an activity is "religious" in a judge's eyes, the District Court has applied a complex test requiring examination of the Church's administration, rituals and tenets. 594 F.Supp. at 799, App. 10a-11a. Under the extensive case-by-case inquiry the District Court prescribed, no religious organization could be certain ahead of time of its exposure to Title VII liability for hiring its own believers. Inevitably, churches will be forced to err on the side of caution and admit non-believers into ac-

tivities with substantially religious elements. A church could never be certain that it would not have to hire individuals strongly opposed to its teachings.

Congress recognized and solved this very problem when it enacted the 1972 amendment. During the Senate debate, the amendment's sponsor, Senator Ervin, stated, citing Justice Douglas:

> It is impossible to separate the religious and non-religious aspects of a religious corporation.

118 Cong. Rec. at 1973 (Feb. 1, 1972). This Court likewise has recognized, in the context of a free exercise claim, that whether an activity or belief is "religious" or not "is not to turn upon a judicial perception of the particular beliefs or practice in question .... Courts are not arbiters of scriptural interpretation." *Thomas* v. *Review Board of Indiana Employment Security Division,* 450 U.S. 707, 714, 716 (1981).

First Amendment values are not only not promoted, but actually violated by a checklist approach in a case such as this. Assuming *arguendo* that Section 702 may have some effects that advance religion, the First Amendment's Establishment Clause values would be seriously endangered by holding the 1972 amendment unconstitutional for that reason alone. The Establishment Clause problems of serious dimension are not purpose problems or effect problems; they are entanglement problems. They are problems that result not from the 1972 amendment, but from the law that would have remained in place if Congress had enacted no amendment. As stated by Senator Ervin:

> ...this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be.

118 Cong. Rec. 4503, *quoted at* 594 F.Supp. at 809, App. 32a.

2b. Even assuming the applicability of the *Lemon* test, the District Court's judgment must be reversed. The District Court held that "there was a valid legislative purpose" behind the amendment to Section 702 (594 F.Supp. at 812, App. 40a), and that it need not reach the entanglement issue because of its conclusion that the "effect of the exemption of religious organizations from Title VII for religious discrimination in secular, non-religious activities is to advance religion...." *Id.* at 828, App. 75a.

As this Court held in *Thomas, supra,* any "benefit" to religion from an exemption like that in Section 702 "manifests no more than the tension between the two Religious Clauses...", 450 U.S. at 719. That description also fits the 1972 amendment, which for that reason cannot be said to advance religion.

The District Court's conclusion concerning a proper congressional purpose is clearly correct. And in this particular case, given the background of Section 702, the holding concerning the purpose prong of the *Lemon* test should have led to favorable rulings with respect to effect and entanglement. The statutory enactment at issue is the 1972 amendment. The only relevant *effect* of that amendment was to take the federal courts out of the business of determining which church programs are sufficiently religious, and return that task to the churches themselves. Since both the purpose and effect of the amendment were to *relieve* entanglement between church and state, it is difficult to see how there could be any serious entanglement problem. By contrast, the District Court has entangled itself at the very heart of religious administration, tenet and ritual, as demonstrated by its own broad request for discovery. 594 F.Supp. at 803, App. 18a-19a.

3. The appellants acted in reliance upon an Act of Congress in managing the Church's affairs. Nevertheless, the District Court has awarded back wages, other economic

damages, and reinstatement to Mr. Mayson. Had the appellants acted in reliance on a ruling by the EEOC rather than the plain language of the statute, no such sanctions could have been imposed. 42 U.S.C. § 2000e-12(b); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). This Court has determined that damage awards are not mandatory in civil rights cases, *Carey* v. *Piphus,* 435 U.S. 247 (1978), but it has not had occasion to examine the propriety of such an award against an employer that has squarely relied on the clear provisions of the congressional statute. Whether such an award is proper under these circumstances is a novel and significant question that merits full consideration by this Court.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and schedule this case for briefing and oral argument.

August 4, 1986

Respectfully submitted,

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86-179

No. 86-

Supreme Court, U.S.
FILED
AUG 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,
UNITED STATES OF AMERICA,
Intervenor,
v.
CHRISTINE J. AMOS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPENDIX TO THE JURISDICTIONAL STATEMENT

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*The Appendix to the Jurisdictional Statement ("App.") has been separately bound pursuant to Rule 15.1(j).

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CIV. NO. C-83-0492W

CHRISTINE J. AMOS, JUDY BAWDEN, DENIECE KANON, APRIL JOYCE RIDING, AND ARTHUR FRANK MAYSON ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
PLAINTIFFS,

v.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, AND THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
DEFENDANTS.

JAN. 11, 1984.

Elizabeth T. Dunning, David B. Watkiss, Molly B. Kenny, John E. Harvey, Salt Lake City, Utah, for plaintiffs.

Dan S. Bushnell, M. Karlynn Hinman, David P. Farnsworth, Salt Lake City, Utah, for defendants.

Paul E. Reimann, Salt Lake City, Utah, amicus curiae.

MEMORADUM DECISION AND ORDER

WINDER, District Judge.

The defendants' motion to dismiss or, in the alternative, for summary judgment was argued orally on October 12, 1983. The plaintiffs were represented by Elizabeth T. Dunning, David B. Watkiss and Molly B. Kenny. Paul E. Reimann appeared as amicus curiae. The defendants were represented by Dan S. Bushnell and M. Karlynn Hinman. Prior to the hearing, the court had carefully read all memoranda of counsel, including the amicus curiae brief and supplemental brief filed by Mr. Reimann. After the hearing, the court took the matter under advisement and has since reviewed the memoranda and attachments thereto and has read all relevant authorities. Based on those materials and oral argument, the court renders the following decision and order.[1]

I.

Background

The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints ("the C.P.B.") and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints ("the C.O.P.") are wholly owned by

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[1]On October 24, 1983, an amended complaint was filed in this matter. No new issues appear to be presented in the amended complaint, but two more individuals have been added as plaintiffs. The parties have stipulated that the court's decision on the defendants' pending motions will be binding on the two newly named plaintiffs, Ruth Arriola and Shelleen Adamson. Stipulation, C-83-0492W, at paragraph 2 (Nov. 8, 1983). Because those new plaintiffs' situation is identical in all material respects to that of the other plaintiffs and based on the stipulation, the court will only discuss the plaintiffs and counts in the original complaint.

the Church of Jesus Christ of Latter-day Saints ("the Mormon Church"). Both the C.P.B. and the C.O.P. are corporation soles [sic] organized pursuant to the laws of Utah, Utah Code Ann. §§ 16-7-1 to -11 (1973).[2] The C.O.P. operates a clothing mill known as Beehive Clothing Mills ("Beehive") and a gymnasium known as the Deseret Gymnasium ("Deseret"). The C.P.B. has some administrative input in Beehive and Deseret. Beehive manufactures and distributes garments and temple clothing. Deseret is a public gymnasium that contains the normal facilities found in a gymnasium.

Christine J. Amos ("Amos") was employed at Beehive from 1976 to August 25, 1982 in its personnel department. Her responsibilities included the typing and processing of insurance forms and employment applications. Affidavit of Christine Amos, Memorandum In Opposition To Defenddants' Motions [sic] to Dismiss or For Summary Judgment, C-83-0492W (Aug. 24, 1983) ("Opposing Memorandum"), Attachment 1, at paragraph 4. Judy L. Bawden ("Bawden") worked as a seamstress at Beehive from 1971 to April 28, 1982. Deniece Kanon ("Kanon") was employed as a seamstress at Beehive from 1978 to May 14, 1982. April Joyce Riding ("Riding") worked as a seamstress at Beehive from 1974 to May 28, 1982. As seamstresses, all three women performed various steps in the manufacturing of garments and temple clothing before the garments were marked with certain religiously significant symbols. Affidavit of Judy Bawden, Opposing Memorandum, Attachment 2, at paragraphs 2-3; Affidavit of Deniece Kanon, Opposing Memorandum, Attachment 3 at paragraph 4; Affidavit of April Joyce Riding, Opposing Memorandum, Attachment 4, at paragraph 2. Arthur

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[2]A corporation sole may be formed, under Utah law, "for acquiring, holding or disposing of church or religious society property for the benefit of religion, for works of charity and for public worship, in the manner" provided under Utah law. Utah Code Ann. § 16-7-1 (1973).

Frank Mayson ("Mayson") was employed as a building engineer at Deseret. Affidavit of Arthur Frank Mayson, Opposing Memorandum, Attachment 5, at paragraph 2. As building engineer, Mayson was responsible for maintaining the physical facility at Deseret, the equipment in the facility and the outside grounds. Id., at paragraph 3. All five individuals were fired from their jobs solely because each of them was unable or refused to satisfy the Mormon Church worthiness requirements for a temple recommend.

Amos, Bawden, Kanon, Riding and Mayson ("the plaintiffs") filed suit against the C.P.B. and the C.O.P. ("the defendants"), purporting to represent a class of employees, present and future, allegedly similarly situated. Their complaint against the defendants rests on the following grounds: (1) the defendants discriminated against the plaintiffs on religious grounds in violation of federal and state antidiscrimination laws, and the federal and state exemption from antidiscrimination laws, 42 U.S.C. § 2000e-1 and Utah Code Ann. § 34-35-2(5), respectively, as applied to employees performing non-religious jobs, violates the establishment clause of the first amendment and the due process and equal protection guarantees of the fifth amendment; (2) the plaintiffs' discharges amounted to wrongful discharges under Utah law for which they are entitled to damages and (3) the defendants wrongfully and intentionally inflicted extreme mental and emotional injury and distress on the plaintiffs by requiring them to be interviewed by clergymen concerning their eligibility for temple recommends. See Complaint, C-83-0492W, at 14 (Apr. 4,1982) ("the Complaint"); Opposing Memorandum.

The defendants have moved to dismiss this action or, in the alternative, for summary judgment in their favor. The defendants base their motion on the following arguments: (1) the plaintiffs fail to state a claim under the exemption statutes and under the case law in this circuit; (2) this court should not rewrite the exemption statutes to meet the plain-

tiffs' definition of religious; (3) the exemption statutes are are constitutional; (4) the wrongful discharge claim must be dismissed because there is no such claim under Utah law; and (5) the plaintiffs' claim based on the intentional infliction of emotional distress must be dismissed because the allegations do not set forth a cause of action for such a tort. See Memorandum In Support of Defendants' Motion To Dismiss This Action or, in the Alternative, for Summary Judgment, C-83-0492W (June 15, 1983) ("Supporting Memorandum"); Defendants' Reply Brief In Support of Their Motion To Dismiss or For Summary Judgment, C-83-0492W (Sep. 29, 1983) ("Supporting Brief").

II.

The Law

In their first claim for relief, the plaintiffs assert that the defendants violated section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) and Utah Code Ann. § 34-35-6 (Supp. 1983), by requiring employees to satisfy the Mormon Church worthiness requirements for a temple recommend and that the application of the exemption for religious entities contained in section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 ("section 702") and in Utah Code Ann. § 34-35-2(5) (Supp. 1983) to the defendants to shield them from liability for discriminating against employees performing secular, non-religious jobs on the basis of religion would violate the establishment clause of the first amendment and the due process and equal protection guarantees of the fifth amendment of the United States Constitution. Complaint, at 12-13. They ask this court to permanently enjoin the defendants from applying the Mormon Church worthiness requirement to plaintiffs and other members of the same class of employees. In their second claim for relief, plaintiffs claim that the application of religious qualifications to them and other members of the same class of employees, and ter-

minating plaintiff's employment violate section 2000e-2(a) and Utah Code Ann. § 34-35-6 (Supp. 1983). The plaintiffs seek backpay and reinstatement, pursuant to 42 U.S.C. § 2000e, for those alleged violations.

The defendants have moved to dismiss those claims on the ground that the exemptions for religious entities under federal and state law apply to them and shield them from liability for applying religious qualifications and for terminating plaintiffs for failure to meet those qualifications. The defendants further argue that those exemptions are constitutional. They do not contest that plaintiffs were fired from their employment because they failed to meet the religious test that the defendants imposed.

Section 2000e-2(a) of the United States Code makes it an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Section 34-35-6 of the Utah Code similarly prohibits an employer from engaging in a number of discriminatory employment practices. Among the various prohibitions, Utah has made it unlawful:

> For an employer to refuse to hire, to discharge, to promote, demote, or to discriminate in matters of

> compensation against any person otherwise qualified, because of race, color, sex, age, if the individual is 40 years of age or older, religion, ancestry, national origin, or handicap.

Utah Code Ann. § 34-35-6(1)(a) (Supp. 1983). It is undisputed that the plaintiffs were fired from their employment because they failed to meet religious qualifications imposed by the defendants. Thus, under both federal and state law, the defendants engaged in unlawful discriminatory conduct unless they are exempt from those antidiscrimination provisions.

Both the state and federal antidiscrimination laws provide an exemption for religious entities. The federal exemption, section 702, provides:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1. Utah has exempted religious entities from the coverage of its antidiscrimination act by excluding them from the definition of employer:

> "Employer" means the state or any political subdivision or board, commission, department, institution or school district thereof, and every person employing 25 or more employees within the state; but does not include religious organizations or associations, religious corporations sole, nor any corporation or association constituting a wholly owned subsidiary or agency of any

> religious organization or association or religious corporation sole, a bona fide private membership club (other than a labor organization).

Utah Code Ann. § 34-35-2(5) (Supp. 1983). The plaintiffs do not contest that the defendants or the Mormon Church are religious entities;[3] what they contend is that application of the exemptions to employees performing secular, non-religious jobs is unconstitutional and that the plaintiffs were employees performing secular, non-religious jobs. In discussing the plaintiffs' claims of unconstitutionality, the court will only discuss section 702 because the determination regarding the federal law applies with equal force to the state exemption as it relates to the facts of this case.

A. The Question of Constitutionality

It is well established that a court may not "decide any constitutional question in advance of the necessity for its decision...." *Federation of Labor v. McAdory,* 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725 (1945). *Accord Rosenberg v. Fleuti,* 374 U.S. 449, 451, 83 S.Ct. 1804, 1806, 10 L.Ed.2d 1000 (1963) (courts " 'ought not to pass on questions of constitutionality...unless such adjudication is unavoidable....' "). [sic]) Thus, if a case can be decided on a nonconstitutional issue, the court should not reach the constitutional issues. *Peters v. Hobby,* 349 U.S. 331, 338, 75 S.Ct. 790, 793, 99 L.Ed. 1129 (1955). In keeping with those principles, this court must address two threshold issues which may obviate the need to decide whether section 702 is constitutional as applied to employees performing secular, non-religious jobs. First, it must determine whether this case involves "religious" ac-

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[3] It is not clear whether the defendants are relying on themselves or the Mormon Church as the religious corporation, association or society for purposes of section 702. The plaintiffs, however, do not contest that either the defendants or the Mormon Church are [sic] religious entities under section 702.

tivities. Second, if the court determines that this case does not involve "religious" activities, the court must examine section 702 to determine whether it applies to non-religious activities.

The plaintiffs contend that, in analyzing whether this case involves religious activities, the court should focus on the type of jobs that plaintiffs were performing and not on the general nature of Deseret or Beehive. In support of their position, plaintiffs refer the court to Title VII cases in which courts have inquired into the particular job at issue to determine whether Title VII may be applied to a religious entity for racial and sexual discrimination and claims of retaliation.[4] After reading those cases, the court is not persuaded that a job by job analysis is the appropriate approach in all cases. Rather, the language of section 702, both in its original[5] and amended version; the definition of

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[4]In those cases, the courts were not addressing whether a court should look to the nature of the activity or the employees [sic] job in determining whether an activity is "religious"; those cases involved a determination as to whether a particular job is a position so religious in nature and purpose that the application of Title VII would offend the first amendment. *See, e.g., EEOC v. Pacific Press Publishing Ass'n,* 676 F.2d 1272 (9th Cir.1982); *EEOC v. Southwestern Baptist Theological Seminary,* 651 F.2d 277 (5th Cir.1981), *cert. denied,* 456 U.S. 905, 102 S.Ct. 1749, 72 L.Ed.2d 161 (1982); *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir.), *cert. denied,* 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153, *reh'g denied,* 409 U.S. 1050, 93 S.Ct. 513, 34 L.Ed.2d 504 (1972).

[5]The relevant portion of section 702, unamended, read:

> This subchapter shall not apply...to a religious corporation, association, or society *with respect to the employment of individuals* of a particular religion *to perform work connected with the carrying on by such corporation,* association, or society *of its religious activities....*

Pub. L. No. 88-352, 78 Stat. 255, formerly codified at 42 U.S.C. § 2000e-1 (1964) (emphasis added).

"religion" in Title VII;[6] the exemption for religious organizations required by the constitution,[7] and the analysis used by courts in carving out a judicial exemption from Title VII for religious organizations with regard to sexual and racial discrimination and claims of retaliation[8] convince this court that the proper analytical framework for determining whether an activity is religious in religious discrimination suits consists of a three prong test. First, the court must look at the tie between the religious organization and the activity at issue with regard to areas such as financial affairs, day-to-day operations and management. Second, whether or not there is a close and substantial tie between the two, the court next must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial connection between the activity in question and the religious organization's religious tenets or matters of church administration and the tie under the first part of the test is close, the court does not need to proceed any further and may declare the activity religious. See *Feldstein v. Christian Science Monitor,* 555 F.Supp. 974 (D.Mass.

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[6]The term "religion" is defined as including "all aspects of religious observance and practice, as well as belief...." 42 U.S.C. § 2000e(j).

[7]The court in *King's Garden, Inc. v. F.C.C.,* 498 F.2d 51 (D.C.Cir.), *cert. denied,* 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974), explained the constitutional requirements as follows:

> The Free Exercise Clause precludes governmental interference with ecclesiastical hierarchies, church administration, and appointment of clergy.... In addition, the guaranties of Free Exercise, Free Speech and Free Press no doubt combine to provide a religious group the right to choose on sectarian grounds those who will advocate, defend, or explain the group's beliefs or way of life, either to its own members or to the world at large....

Id. at 56 (citations omitted).

[8]See *supra* note 4.

1983).[9] However, where the tie between the religious entity and activity in question is either close or remote under the first prong of the test and the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent, the court must engage in a third inquiry. It must consider the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial relationship between the employee's job and church administration or the religious organization's rituals or tenets, the court must find that the activity in question is religious. If the relationship is not substantial, the activity is not religious.

1. *Deseret*

According to the uncontroverted Affidavit of Leon Heaps, who has been the Manager of Deseret and a member of its governing board for the past eight years, the original and present facilities of Deseret were built with funds made available by C.O.P. and were built on property owned by C.P.B. The First Presidency of the Mormon Church, which is composed of the President of the Mormon Church and two or more counselors whom he chooses to advise him, appoints the members of the governing board of Deseret, and those members serve at the discretion of the First Presidency. The board currently

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[9]In *Feldstein*, the court reached the conclusion that the Christian Science Monitor was a religious activity after finding that there was a "close and significant relationship between the Christian Science Church, the Publishing Society and The Monitor" and that "the declared purpose, both at the time of its founding and until the present, of the Monitor [was] to promulgate and advance the tenents [sic] of Christian Science." *Feldstein*, 555 F.Supp. at 978.

includes two general authorities of the Mormon Church,[10] one member of the Young Women's Presidency of the Mormon Church, one member of the General Board of the Relief Society of the Mormon Church, one member of the general counsel [sic] of the Church, and two members at large.[11] Deseret has no corporate or financial existence separate from C.O.P. and does not have a bank account in its own name. Deseret makes its purchases through the central purchasing division of C.O.P., and the personnel for Deseret are selected and hired through the personnel department of C.O.P. Deseret is exempt from federal and state taxes.[12] Those facts clearly establish[13] that there is an intimate connection between Deseret and the defendants and the Mormon Church.[14]

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[10]The general [sic] authorities [sic] of the Mormon Church include the President, his chosen counselors [sic], a group of twelve men known as the twelve [sic] apostles [sic], and members of the quorum [sic] of seventies [sic].

[11]There is no indication on the record what criteria the First Presidency of the Mormon Church uses to select members of the governing board for Deseret.

[12]Those exemptions may be on the basis of Deseret's charitable activities and not because it is a religious activity. See Affidavit of Leon Heaps, Supporting Brief, Attachment, at paragraph 2; In the Matter of: Church of Jesus Christ of Latter-day Saints, Findings of Fact, Conclusions and Decision, Property I.D. No. 01 3095 (Sept. 21, 1983); Affidavit of Richard Edgley, Supporting Memorandum, Attachment, at paragraphs 2-3; Affidavit of Leon Olsen, Supporting Memorandum, Attachment, at paragraph 5.

[13]There is a dispute as to whether Deseret has made or is making a profit.

[14]In *Feldstein,* the court also found there was a close tie between the religious organization and activities involved. There, the court found that the Christian Science Church regularly subsidized the Monitor; that the Board of Directors for the Christian Science Church is charged with the duty to keep church periodicals edited and abreast of times, is responsible for daily reviewing material appearing in the Monitor, is responsible for its editorial content and elects the editors and manager of the Publishing Society; that the by-laws provide that no one shall be

(footnote cont. on p. 13-a)

That does not end the inquiry, however, because, even though a religious entity may be intimately involved with the management, the day-to-day operations and the financial affairs of an activity, "not every endeavor that is affiliated, however tenuously, with a recognized religious body may qualify as a religious activity." *Feldstein,* 555 F.Supp. at 978. To qualify, there must be a clear relationship between the primary function which Deseret performs and the religious beliefs and tenets of the Mormon Church or church administration.

The Mormon Church was established in 1830. In 1911, the Mormon Church opened Deseret. Although the dedicatory prayer and the announcement of the opening of Deseret in an official publication of the Mormon Church emphasize that Deseret is to maintain an atmosphere reflecting the standards of the Mormon Church, there is nothing in the running or purpose of Deseret that suggests that it was intended to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration.[15] Rather, its primary

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(footnote cont. from p. 12-a)

connected with the publishing efforts of the Church if he is not acceptable to the Board; that the Publishing Society appoints a Monitor Advertising Information Committee, on recommendation of local branch churches, that formulates, in part, the advertising policy of the Monitor; and that the circulation of the Monitor is developed by members of the Christian Science Church who act, without being compensated, as circulation representatives and through Christian Science Reading Rooms. *Feldstein,* 555 F.Supp. at 977.

[15]The dedicatory prayer provides, in part:

> Our Father in Heaven, we are assembled for the purpose of dedicating this Recreation Center, or Deseret Gymnasium, as a place where Thy sons and daughters may come to obtain training and exercise beneficial to their physical condition, that their minds may be kept alert and their bodies fitted to the many duties and responsibilities which

(footnote cont. on p. 14-a)

function is to provide facilities for physical exercise and athletic games. Deseret is open to the public for annual

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(footnote cont. from p. 13-a)

> may be required of them in their daily occupations. Provision has been made for various kinds of exercise that will be suited to the needs of one and all, that will help to fit them for the various vicissitudes of mortal life. Skilled and faithful teachers will be provided so that all that is done by way of activity will be conducted under proper direction and in keeping with the laws of physical health. Lessons in relation to the care of the body will be provided for all.
>
> Moreover the day will begin with humble prayer and it is the intention that whatever is done by way of exercise, training and recreation of those who patronize this gymnasium will be done in the spirit of prayer and obedience to Thy commandments.
>
> We pray that no unclean thing may enter here but that the spirit of peace, fellowship and faithful obedience to Thy divine will and commandments may permeate this building and that all who assemble for exercise, physical development and recreation may be impressed with the fact that Thy spirit is here....
>
> We pray our Father that ... the exercises, games and other activities will leave an impression to cause those who take part to seek for righteousness.
>
> [M]ay all who assemble here, and who come for the benefit of their health, and for physical blessings, feel that they are in a house dedicated to the Lord. [W]e pray that ... all who come may keep the commandments of the Lord.
>
> [M]oreover we pray that all who come may feel that the Spirit of the Lord is here, whether it be in athletic fields or in the gatherings which will come for religious purposes.
>
> ....
>
> Now, our Father, we thank Thee for this building. May we always keep it sweet and clean morally, physically and spiritually and that the influence of Thy Holy Spirit may abide here. We ask Thee to accept our labors and Thy blessings be made manifest through all time, we humbly pray in the name of Jesus Christ Thy Beloved Son. Amen.

Supporting Memorandum, Attachment.

membership fees or for daily or series admission fees.[16] It offers the same facilities and services that are available in other gymnasiums, and the employees perform the same jobs that are performed at any public gymnasium or athletic club. See Affidavit of Arthur Frank Mayson, Opposing Memorandum, Attachment 5. Deseret's no smoking rule is as consistent with the beliefs and practices of athletics as it is with the beliefs of the Mormon Church; furthermore, Deseret does not enforce the no smoking rule in the beauty shop and women's massage salon, which are profit-making private concessions contained within the building housing the gymnasium. Id. at paragraph 8. More importantly, there is no evidence or a contention that the religious tenets of the Mormon Church involve or require religious discrimination in employment. To the contrary, the Mormon Church, through one of its wholly owned subsidiaries, has stated that "it is 'morally evil' to deny anyone the right to employment." *In re Application of Chronicle Broadcasting Co.*, 59 F.C.C.2d 335, 377 (1976). Furthermore, the plaintiffs do not contend and there is no evidence that it is a fundamental tenet of the Mormon Church that its members must engage in physical exercise and activity and must do so in a gymnasium owned and operated by the Mormon Church and in which all employees are practicing members of the Mormon Church. In addition, defendants do not contend and there is no evidence that engaging in physical exercise is a religious ritual of the Mormon Church, or that Deseret is used as a means of teaching or spreading the Mormon

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[16]The court agrees with the statement in *Feldstein* that "a religious activity of a religious organization does not lose that special status merely because it holds some interest for persons not members of the faith, or occupies a position of respect in the secular world at large." *Feldstein*, 555 F.Supp. at 978. However, the fact that Deseret is open to the public is a factor to consider in determining the nature of the activity.

Church's religious beliefs or practices. Although the Mormon Church has expressed its desire that members of the Mormon Church engage in physical exercise and have [sic] attempted to provide a facility to accommodate that desire in an atmosphere which exemplifies its beliefs, the function of Deseret is far from closely related to any religious beliefs or tenets of the Mormon Church or church administration.[17]

In contrast, the Christian Science Monitor ("the Monitor"), the activity at issue in *Feldstein*, was closely tied to the promulgation and advancement of the tenets of the Christian Science Church. The by-laws of the Christian Science Church stated that "it is the 'privilege and duty' of every member of the Church to subscribe to periodicals published by the Church, including the Monitor." *Feldstein*, 555 F.Supp. at 977. The Monitor is published by the Christian Science Publishing Society ("The Publishing Society"), which is an organ of the Christian Science Church. The deed of trust of the Publishing Society declares that its purpose is "more effectually promoting and extending the religion of Christian Science." *Id.* The Board of Trustees of the Christian Science Church is required to "conduct the business of the Christian Science Publishing Society on a strictly Christian basis, for the promotion of the interests of Christian Science." *Id.* The by-laws require the Christian Science Church to provide a building for the Monitor's operations. *Id.* The Monitor elects, on religious grounds, not to carry advertisements for liquor, tobacco, drugs,

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[17]The court's finding does not in any way comment on the charitable nature of Deseret. Although the charitable functions that Deseret perform may be an example of the charitable services that the Mormon Church performs generally, there has been no claim or showing that the charitable services are intimately connected to religious beliefs or tenets of the Mormon Church.

medicines, vitamins and energy stimulants. *Id.* Both the Publishing Society and the Monitor were established by Mary Baker Eddy, who founded the Christian Science faith.

All those facts demonstrate that there is an intimate relationship between the function that the Monitor serves and the tenets of the Christian Science Church. None of those or similar facts are present in this case. Thus, although there is a close tie between the Mormon Church and Deseret with regard to management, day-to-day operations and financial affairs, the more crucial connection — the relationship between the purpose of Deseret and the religious beliefs and practices of the Mormon Church or its administration — is lacking. Those circumstances mandate that the court consider the position that plaintiff Mayson held at Deseret.

At the time plaintiff Mayson was terminated from his employment at Deseret, he held the position of building engineer, a position he had since 1972. Affidavit of Mayson, Opposing Memorandum, Attachment 5, at paragraph 1. As the building engineer, plaintifff Mayson was responsible for maintaining the physical facility at Deseret, the equipment in the facility and the grounds outside the facility. Specifically, the plaintiff's duties included the following. He had to maintain the swimming pools and chlorinating equipment, the whirlpools, exercise machines, athletic equipment, locks and lockers, electric motors, air compressors, air conditioners, furnaces, washer and dryer, showers and other plumbing and the electrical system. In addition, he was responsible for ordering the custodial and certain other supplies. Plaintiff Mayson supervised fourteen custodians and parking-lot attendants. *Id.* at paragraph 3.

None of those duties is even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration. Furthermore, none of

those duties can potentially further any alleged religious activity in which Deseret may engage. Thus, there is no basis on which the court can find that this case, as it relates to Deseret, involves religious activities.[18]

2. *Beehive*

The limited facts in the record indicate that Beehive and its employees create a much closer question as to whether there are sufficient relationships between the religious organizations, Beehive and the Beehive employees to find that the case, as it relates to Beehive, involves religious activity. After carefully reviewing the record, however, the court is left with the distinct impression that the present state of the record is not sufficient to form the basis for a ruling on the religious nature of Beehive or the jobs of the plaintiffs who were employed there. Although there are facts indicating that Beehive may not be a religious activity and that plaintiffs' jobs are not "religious," the court believes that discovery needs to be conducted to supplement the record. Among other areas, the court thinks that plaintiffs are entitled to conduct discovery in the following areas: (1) the manufacturing of garments prior to 1960 and any subsequent changes; (2) the distribution of garments prior to 1960 and any subsequent changes; (3) the tax exempt status of Beehive; (4) the past and current employees who were or are nonmembers of the Mormon Church; (5) Beehive's contracts,

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[18]Plaintiffs contend that defendants are not entitled to summary judgment that Deseret and Beehive are "religious" activities, arguing that they are entitled to discovery concerning a variety of factual matters. Opposing Memorandum, at 64. In light of the defendants' position that summary judgment is proper, the state of the record and the areas into which the plaintiffs seek discovery, the court believes that any evidentiary supplement to the record would, if it had any effect, reinforce the court's findings and would not create any material issues of fact.

both past and current, with private commercial enterprises for the production of garments; and (6) current hiring practices of the defendants' garment and temple clothing manufacturing plants in Mexico and England. Until those areas and others have been fully developed, the court cannot rule on whether this case, as it relates to Beehive, involves religious activities.

Having reached those conclusions with regard to the nature of the activities involved in this case, the court now must address whether section 702 covers secular, non-religious activities. In making that determination, the court is guided by the following general principles. A court should not construe a statute to violate the constitution "if any other possible construction remains possible." *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500, 99 S.Ct. 1313, 1318, 59 L.Ed.2d 533 (1979). *See Rosenberg v. Fleuti,* 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963); *Communist Party v. Catherwood,* 367 U.S. 389, 81 S.Ct. 1465, 6 L.Ed.2d 919 (1961). On the other hand, "a court may not exercise legislative functions to save [a] law from conflict with constitutional limitation." *NLRB v. Catholic Bishop of Chicago,* 440 U.S. at 509, 99 S.Ct. at 1323 (Brennan, J., dissenting) (quoting *Yu Cong Eng v. Trinidad,* 271 U.S. 500, 518, 46 S.Ct. 619, 623, 70 L.Ed. 1059 (1926)). However, if the inclusion of certain persons within the coverage of a broadly worded statute would raise serious constitutional questions, the court must find that Congress expressed an affirmative intention to include those persons within the statute's coverage. *See id.* at 501, 507, 46 S.Ct. at 619, 620.

As can be seen from the discussion below, the application of the exemption from Title VII to employees performing secular, non-religious jobs raises serious constitutional questions. Thus, the court must determine whether Congress expressed an affirmative intention to include those employees within the exemption of section

702. To make that determination, the court must look to the statutory language and the legislative history of the statute. *See id.* at 500, 504-07, 46 S.Ct. at 619, 620.

Section 702, as amended in 1972, provides clearly and unequivocally, that religious corporations, associations, educational institutions and societies are exempt from the coverage of Title VII "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by [such an entity] *of its activities*." 42 U.S.C. § 2000e-1 (emphasis added). Under a fair reading of that provision, designated religious entities may discriminate against employees on religious grounds with respect to *all* their activities, not just their religious activities.

The legislative history of the 1972 amendment to section 702 further substantiates that interpretation of section 702. See *infra* Section B1. For example, the joint explanatory statement of the managers at the conference on the 1972 amendments to Title VII states that "the Senate provision expanded the exemption for religious organizations from coverage under this title with respect to the employment of individuals of a particular religion in *all* their activities instead of the present limitation to religious activities." 1972 U.S. CODE CONG. & AD.NEWS 2137, 2180 (emphasis added). In addition, when the House was discussing the conference report on the amendments to Title VII, Representative Erlenborn made the following statement with regard to the amendment to section 702:

> Religious institutions will be covered, but with a broad exemption for anyone employed by a religious institution rather than only those people who might be utilized in religious work per se. So that I think it was clearly the thought of the conference that if a religious institution is engaged in

> a profit making venture they still are not covered by the provisions of this act.

118 Cong.Rec. 7567 (1972) (remarks of Rep. Erlenborn).

Thus, both the language of section 702 and the legislative history of the 1972 amendment to that section negate any possibility that the court could limit the application of section 702 to "religious" activities. Rather, the court is compelled to conclude that the legislative intent of that amendment is that all religious organizations, associations, educational institutions and societies may discriminate, on religious grounds, in all their activities against all their employees. The court therefore must address the plaintiffs' constitutional challenge to section 702.

B. Establishment of Religion Clause

The first amendment to the United States Constitution prohibits Congress from making any law to inhibit or establish religion. *See NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 499, 99 S.Ct. 1313, 1318, 59 L.Ed.2d 533 (1979). That amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const. amend. I ("the religion clauses"). To the people who wrote the religion clauses, "the 'establishment' of a religion connoted sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz v. Tax Commission of the City of New York,* 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970).[19] After numerous pronouncements by the Supreme Court, it is now

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[19]For a discussion of the history of the establishment clause, see *Engel v. Vitale,* 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); *Everson v. Board of Education,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

> firmly established that a law may be one "respecting an establishment of religion"[20] even though its consequence is not to promote a state religion ... and even though it does not aid one religion more than another but merely benefits all religions[21] .... It is equally well established, however, that not every law that confers an "indirect," "remote," or "incidental" benefit upon religious institutions is, for that reason alone, constitutionally invalid.

Committee for Public Education v. Nyquist, 413 U.S. 756, 771, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948 (1973).

When a law is challenged on the ground that it violates the establishment clause because the law affords "a uniform benefit to *all* religions," the court is to be guided by the three part test that the Supreme Court set forth in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, *reh'g denied,* 404 U.S. 876, 92 S.Ct. 24, 30 L.Ed.2d 123 (1971); *Larson v. Valente,* 456 U.S. 228, 252, 102 S.Ct. 1673, 1687, 72 L.Ed.2d 33, *reh'g denied,* 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1323 (1982) (emphasis added). The *Lemon* test provides:

> First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits

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[20]In discussing the establishment clause, the Supreme Court has stated that "[a] given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, *reh'g denied,* 404 U.S. 876, 92 S.Ct. 24, 30 L.Ed.2d 123 (1971).

[21]The Supreme Court has stated that the establishment clause at least means that neither a state nor the federal government "can pass laws which aid one religion, all religions or prefer one religion over another." *Everson v. Board of Education,* 330 U.S. 1, 15, 67 S.Ct. 504, 511, 91 L.Ed. 711 (1947).

> religion ...; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon, 403 U.S. at 612-13, 91 S.Ct. at 2111. *Accord, Mueller v. Allen,* 463 U.S. 388, [394], 103 S.Ct. 3062, 3064, 3066, 77 L.Ed.2d 721 (1983).[22] If the court finds that the statute being challenged violates any of the three parts of the test, the court must find that the statute is unconstitutional under the establishment clause. *Stone v. Graham,* 449 U.S. 39, 40-42, 101 S.Ct. 192, 193-194, 66 L.Ed.2d 199 (1980) (per curiam), *reh'g denied,* 449 U.S. 1104, 101 S.Ct. 904, 66 L.Ed.2d 832 (1981).[23]

Even with the aid of that analytical framework the court faces a very difficult task. As the Supreme Court acknowledged in *Nyquist,*

> it is evident from the numerous opinions of the Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no "bright line" guidance is afforded. Instead, while there has been general agree-

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[22]In *Mueller,* the Supreme Court emphasized that the *Lemon* test provides " 'no more than [a] helpful signpost' in dealing with Establishment Clause challenges." *Mueller,* 463 U.S. at [394], 103 S.Ct. at 3066 (quoting *Hunt v. McNair,* 413 U.S. 734, 741, 93 S.Ct. 2868, 2873, 37 L.Ed.2d 923 (1973)).

[23]The court is aware that the United States Court of Appeals for the District of Columbia Circuit, in dictum, stated that section 702 is unconstitutional as applied to discrimination against employees performing non-religious jobs. *King's Garden, Inc. v. F.C.C.,* 498 F.2d 51 (D.C.Cir.), *cert. denied,* 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974). The district court in *Feldstein v. Christian Science Monitor,* 555 F.Supp. 974, 978-79, also expressed, in dictum, doubt as to the constitutionality of the extension of the exemption provided for religious organizations to *all* their activities. The court has not found any case since those two cases where a court has been faced with the issue raised here: the constitutionality of section 702 as applied to religious discrimination against an employee who performs a secular non-religious job.

> ment upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with invariable clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law."

Nyquist, 413 U.S. 761 n. 5, 93 S.Ct. at 2959 n. 5 (quoting *Lemon*, 403 U.S. at 612, 91 S.Ct. at 2111).[24]

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[24]The defendants place great reliance on *Larsen v. Kirkham*, 499 F.Supp. 960 (D.Utah 1980), *aff'd per curiam*, No. 80-2152 (10th Cir.Dec. 20, 1982) (unpublished opinion), *cert. denied*, [464] U.S. [849], 104 S.Ct. 157, 78 L.Ed.2d 144 (1983). That case is inapposite. In *Larsen*, Judge Jenkins ruled only on the constitutionality of 42 U.S.C. § 2000e-2(e)(2), which applies exclusively to religious schools. He expressly confined his analysis to that section, despite the plaintiff's attack on section 702. Judge Jenkins did note, however, that the court in *King's Garden, Inc. v. F.C.C.*, 498 F.2d 51 (D.C.Cir. 1974), had expressed the opinion that section 702 was of doubtful constitutionality. He distinguished that case from *Larsen* on the ground that "the court was concerned with the fact that § 702 would permit religious discrimination by religious organizations in even the most secular of their endeavors" and that "[i]mplicit in the opinion is the court's approval of an exception for religious schools." 499 F.Supp. at 965 n. 7.

It is clear from reading the *Larsen* opinion that the exemption at issue there, section 2000e-2(e)(2), involves different and more compelling free exercise concerns. Furthermore, the legal issue presented in *Larsen* is different from the issue presented in this case. In *Larsen*, the plaintiff conceded that it was constitutionally permissible for the college to hire only members of the Mormon Church but contended that the Constitution would not permit the college to discriminate among church members based on standards of church participation. *Id.* at 966. Judge Jenkins rejected that argument, stating that there were no "constitutional nuances which permit a religious organization to hire its own members to teach, but prohibit it from refusing to retain nominal members who are perceived as not in conformity with the currently expressed ideals of religious practice." *Id.* at 967. The only matters in *Larsen* that Judge Jenkins found to be internal church affairs exempt from government interference were "whom it will regard as members and who will best propogate [sic] its doctrine." *Id.* at 966. This case does not involve those affairs.

1. Secular Purpose

When Congress passed the Civil Rights Act in 1964, it provided a narrow exemption for religious corporations, societies and associations; they were exempted only from discrimination claims with regard to religious discrimination relating to their "religious" activities. Another provision exempted private and religious schools. In 1972, the Civil Rights Act was amended. In addition to other changes in the Act, section 702 was amended to eliminate the exemption of employees of educational institutions;[25] under the amended version, all private and public educational institutions were covered by the provisions of Title VII, except that religious educational institutions were included in the list of other religious entities. More significantly, the amendment broadened the exemption for religious corporations, associations, educational institutions and societies to allow these entities to engage in religious discrimination in all their activities instead of limiting the exemption to religious activities.

A review of the legislative history of the 1972 amendment reveals that there were several proposed amendments to section 702. The Labor and Public Welfare Committee ("the Committee") submitted a report and recommended bill amending the Civil Rights Act to the Senate.[26] The proposed amendment that the Committee presented to the

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[25]The special provision relating to educational institutions in Section 703(e)(2), 42 U.S.C. § 2000e-2(e), was not disturbed.

[26]The reason that the court is focusing on the Senate's version of the amendment is because the House did not propose a change to section 702 that would have affected religious organizations, members of the Senate attempted to amend section 702 in several respects, the Senate amended section 702 to read as it currently reads, the House receded and the Senate's amendment to section 702 was passed.

Senate regarding section 702 read as follows:[27]

> This title shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corporation, association, *educational institution*, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution*, or society of its religious activities [or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution].

S.Rep. No. 415, 92d Cong., 1st Sess. 49 (1971).[28] The only reference in the Committee's Report to the amendment to section 702 states:

> The existing exemption for employees of educational institutions is eliminated by an amendment to section 702 (Sec. 3 of the bill).
>
> There are at present over 120,000 educational institutions, with approximately 2.8 million teachers and professional staff members and another 1.5 million nonprofessional staff members. Yet all of these employees are, in effect, without an effective Federal remedy in the area of employment discrimination.

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[27]The underlined words are additions to section 702 as it read in 1972 before being amended, and the bracketed section indicates that portion of the unamended section 702 that the proposed amendment would delete.

[28]The proposed House bill that came out of the Committee on Education and Labor would have amended section 702 by only deleting the exemption for educational institutions; it would not have added educational institutions to the list of religious entities contained in section 702. See H.R.Rep. No. 238, 92d Cong., 1st Sess. 35 (1971).

The presence of discrimination in the Nation's educational institutions is no secret. Many of the most famous and best remembered civil rights cases have involved discrimination in education. This discrimination, however, is not limited to the students alone. Discriminatory practices against faculty, staff and other employees is [sic] also common. The practices complained of parallel the same kinds of illegal actions which are encountered in other sectors of business, and include illegal hiring policies, testing provisions which tend to perpetuate racial imbalances and discriminatory promotion and certification techniques.

As in other areas of employment, statistics for educational institutions indicate that minorities and women are precluded from the more prestigious and higher-paying positions, and are relegated to the more menial and lower-paying jobs....

The Committee believes that it is essential that these employees be given the same opportunity to redress their grievances as are available to other employees in the other sectors of business. Accordingly, the Committee has concluded that educational institutions, like other employers in the nation, should report their activities to the Commission and should be subject to the Act. There is nothing in the legislative background of Title VII, nor does any national policy suggest itself, to support the present exemption. In fact, the Committee believes that the existence of discrimination in educational institutions, is particularly critical. It is difficult to imagine a more sensitive area than educational institutions, where the youth of the nation are exposed to a multitude

> of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination.

Id. at 11-12. *Accord,* H.R. Rep. No. 238, 92d Cong., 1st Sess. 19-20 (1971), *reprinted in,* 1972 U.S.CODE CONG. & AD. NEWS 2137, 2154-55. Thus, it is apparent that the proposed change in section 702 that the Committee sent to the Senate had nothing to do with the exemption for religious organizations; it focused entirely on narrowing the exemption for educational institutions.

When the proposed Senate Bill reached the Senate, there were a succession of attempts to further amend section 702. On January 24, 1972, Senator Allen brought up for discussion his and Senator Ervin's Amendment No. 809, which would strike out the word "religious" where it appears before the word "activities". Excerpts from the Congressional Record demonstrate that the proposed amendment was directed at religious educational institutions and not at religious organizations per se.[29]

> Mr. ALLEN ...
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> ....
>
> One of the most horrendous provisions of S.2515 is section 3, which removes the existing exemption for employees of educational institutions as presently contained in section 702 of the Civil Rights Act of 1964. This over-zealous proposal attempts, first, to subvert academic freedom and, second, violates the prohibition contained in the

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[29]Several comments by Senator Ervin during the debate refer to religious organizations generally. 118 Cong.Rec. 948 (1972).

first amendment which guarantees the free exercise of religion.

Mr. President, under the present law, is exempted from the provisions of the EEOC Act not only educational institutions of all kinds but also religious corporations, associations, or societies with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities. Then it goes on in the section which is deleted from the law by the present bill, this clause, and it removes this exemption: "or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

So it removes from the exemption, from the operation of the EEOC Act, all educational institutions of any sort with respect to their educational activities; then as to societies or corporations or associations with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities.

So that the only exemption that is given to religious societies or associations or corporations is with respect to the employment of individuals to perform work connected with their religious activities.

In other words, Mr. President, in the case of an educational institution sponsored by a church group, the provisions of the bill now before the Senate would protect that religious association or college or school or society in the employment of

people of its own religion in carrying on the religious activities of that association or corporation or school. If it were a college supported by the Catholic Church or the Baptist Church or the Episcopal Church, the bill as submitted would protect it only as to the employment of someone for enabling it to carry on its religious activity. So that in a church supported school, if the Baptist supported school wanted to employ a Baptist to teach theology, or if a Catholic supported school wanted to employ a Catholic to teach theology, it would be protected.

But as to all its other activities, there would be no protection. Under the provisions of the bill, there would be nothing to prevent an atheist being forced upon a religious school to teach some subject other than theology. A religious school would not like to have an atheist or people of a different faith teaching other subjects and confining its right to be selective in the choice of its faculty only to those phases of the work carrying out its religious activities.

The present law goes on from that, though, and says that every educational institution shall be exempt from EEOC in the carrying on of its educational work, but the present bill removes that exemption. Religious schools are protected under the present law as educational institutions, so that they are exempt. But if the bill as submitted is passed and becomes law, religious schools would be exempt from the provisions of the EEOC Act only insofar as the work pertains to the carrying on of religious activities. The educational activity would not be exempt.

All this amendment would do would be to knock out the word "religious" where it appears in the bill before "activities."

The bill reads as follows:

This title shall not apply to any employer with respect to the employment of aliens outside any State —

This is the present law and in the bill itself.

Or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its religious activities.

The amendment would knock out the word "religious," leaving in the exemption in the carrying out of its activities. Exemption from the act would be provided by the amendment as to religious schools, as to religious societies, as to religious corporations or associations, and as to all educational institutions.

....

When the bill seeks out and draws under its so-called protection, active control, and domination, every school in the country, every college in the country, every church-sponsored school in the country, that is going a little bit too far.

The amendment by the distinguished senior Senator from North Carolina (Mr. Ervin) and myself would preserve this exemption and would leave the present law exactly as it is. It would say to the people who want so greatly to expand the

> field of operations of the EEOC, "Do not touch the colleges. Do not try to take over the method by which the college and schools throughout the country are educating the young people of the country."

118 Cong.Rec. 946-49 (1972) (remarks of Sen. Allen). Senator Allen withdrew the proposed amendment because there was another matter that needed to come before the Senate but stated that he would reoffer the amendment at a later time. *Id.* at 949.

On February 17, 1972, Senator Ervin called up amendment 809. *Id.* at 4503. Although the Senate agreed not to debate the proposed amendment at that time, Senator Ervin made the following statement about that amendment after reading it into the record:

> In other words, the amendment would exempt religious corporations, associations, and societies from the applications of this act insofar as the right to employ people of any religion they see fit is concerned. That is the only effect of this amendment.
>
> In other words, this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be.

Id. That statement demonstrates that the Senator's concerns were not limited to religious educational institutions but extended to all religious institutions, a concern which he had briefly mentioned during the discussions of the amendment on January 24, 1972. *Id.* at 948.

Amendment No. 809 was not called up again until February 21, 1972. At that time neither Senator Ervin nor Senator Allen discussed the matter; Senator Ervin merely

indicated that they were ready to vote. *Id.* at 4813.[30] That amendment was adopted by a voice vote, *id.* at 4813, and incorporated in the final bill passed by the Senate. See *id.* at

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[30]Certain members of the Senate were not convinced that the amendment should be adopted.

> Mr. Williams: Mr. President, the amendment proposed by the Senator from Alabama broadens the present exemption found in title VII and retained in the committee bill, for a religious corporation, association, educational institution or society with respect to employment of individuals of a particular religion to perform work connected with the religious activities of such institution.
>
> This amendment would have the effect of exempting these institutions from the operation of title VII insofar as religion is concerned whether or not their activities are religious or secular.
>
> I do not believe that the religious integrity of these institutions would be compromised by providing equal job opportunitites for employees in positions unrelated to the religious activities of such institutions.
>
> Mr. President, this is the second attempt to provide such an exemption. Several weeks ago, an amendment was offered that would provide a complete exemption from title VII to employees of educational and religious institutions. That amendment, No. 815 was soundly defeated on a vote of 55 to 25 on February 1.
>
> Now, we are faced with another such amendment. Admittedly, it is a much narrower exemption that is offered since it only applies to religion. Nonetheless, I believe it should not be adopted.
>
> Many of these religious corporations and associations often provide purely secular services to the general public without regard to religious affiliation, and most of the many thousands of persons employed by these institutions perform totally secular functions. In this regard, employees in these "religious" institutions perform jobs that are identical to jobs in comparable secular institutions. It is appropriate, therefore, that these persons employed by religious corporations and associations should be given the same equal employment opportunities as those persons employed in comparable positions of secular employers.

118 Cong. Rec. 4813 (1972).

4940-4941, 4944, 4948.[31] The Senate's amendment to section 702 was included in the bill that came out of the conference committee and was approved by both the House and the Senate. See *id.* at 7166-7170, 7563-7567; 1972 U.S. CODE CONG. & AD. NEWS, 2137, 2180.

Prior to the 1972 amendment, the Senate considered and passed an amendment to section 702 that similarly broadened the exemption provided to religious organizations.[32] 116 Cong.Rec. 34,566. Although that proposed amendment never became law, the court believes that the legislative debates on that bill also are relevant, especially in light of Senator Williams' citation to that amendment when the current version of section 702 was being considered by the Senate in 1972. See 118 Cong.Rec. 4813 (1972) (remarks of Sen. Williams).

> Mr. Ervin. Mr. President, under this bill, if a religious educational institution wanted to employ a professor of mathematics it could be compelled by the Commision to employ an infidel as professor of mathematics. In other words, the only exemptions are extended to those actually participating in the religious activities of the religious institution.
>
> Justice Douglas has said in connection with a school prayer case, that you could not separate secular and nonsecular activities of a religious institution. If that is true, this bill trespasses on the first amendment right to religious freedom.

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[31]It appears that there is a typographical error in section 702 of the amended Senate bill that was read in the record after it passed. *See id.* at 4944.

[32]The amendment passed by the Senate in 1970 but never enacted provided, in pertinent part, that Title VII "shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion." 116 Cong.Rec. 34,573 (1970).

> Apart from that, as a matter of policy, I think people who establish a religious institution and people who establish a church should be allowed to select a janitor or a secretary who is a member of the church in preference to some infidel or nonmember. However, they could not do that under this bill. My amendment would exempt religious organizations from the control of the State. If that is not in line with the letter of the law, it certainly is in line with the spirit of the law.
>
> I hope all those who believe in religious freedom will support the amendment. We ought not to let Caesar undertake to control what belongs to God.

116 Cong.Rec. 34,565 (1970) (remarks of Sen. Ervin).

There is an additional matter in the congressional record that helps shed some light on the amendment to section 702. On February 1, 1972, Senator Ervin offered an amendment, Amendment No. 815, which would have excluded educational and religious institutions completely from the coverage of Title VII; that amendment was defeated by a vote of 25 to 55. See 118 Cong.Rec. at 1995. Although that proposed amendment is much broader than the amendment which actually became law, the court believes that the comments made by Senator Ervin during the debate on the proposed amendment further illuminate the legislative purpose behind broadening the religious exemption contained in section 702.[33]

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[33]During the debate and consideration of that proposed amendment, Senator Ervin also made the following comments after quoting section 702 of the bill before the Senate:

> Mr. President, as I construe those words, they attempt to do an impossible thing, that is, to separate the religious activities of a religious corporation, association, educational

(footnote cont. on p. 36-a)

This section would split the activities of a religious organization into two segments, although they are irretrievably held mainly by the organization itself. It would be so generous to the good Lord as to permit the good Lord to retain jurisdiction over those employees of the religious organizations who did work strictly in the religious field, but it would arrogate to the Commission jurisdiction of those employees of the religious organizations whose work was more of a mundane nature.

For example, under the bill in its present form, the EEOC would have the power to compel a Christian church to employ a Mohammedan or an atheist or an agnostic as secretary. When the Federal Government begins to grasp the power of things of the Lord, it is reaching a state of governmental intemperance which is alien to the first amendment. The first amendment was designed to build a wall of separation between church and state; the bill proposes to tear down, in part, that

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(footnote cont. from p. 35-a)

institution, or society, from those of its activities which can be said to be not religious, nonreligious, or unreligious.

As Supreme Court Justice Douglas so well declared in one of the school prayer cases, it is impossible to separate the religious and nonreligious activities of a religious corporation or religious educational institution or religious society from its other activities. This is so because the whole religious organization is one body, and yet the bill would attempt to divorce the two kinds of activities each from the other and give a Federal agency the power to dictate, or at least ultimately to control, the employment practices of religious corporations, religious associations, religious educational institutions and religious societies from each other.

Id. at 1973 (remarks of Sen. Ervin). See *id.* at 1977-1995.

wall of separation and to give to Caesar some of the jurisdiction over the affairs of the Lord. The first amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

In order that the Senate might understand what that provision means, and why it was designed to build an impregnable wall of separation between church and state, I invite the attention of the Senate to the case of Everson against Board of Education of the township of Ewing, which is reported in 30 [sic] U.S. Reports at page 1....

....

I do not read this case for the purpose of judging the soundness of applying the first amendment to the facts in the case, but for the purpose of disclosing to the Senate how the first amendment was attempted to build an impregnable wall of separation between the State — that term being applied here to the Federal Government — and religion....

....

[I]n the words of Jefferson, the clause against the establishment of religion by law was intended to erect a wall of separation between church and state. I respectfully submit that we do not erect a wall of separation between church and state when we permit the agents of the state to tell a religious corporation, a religious association, a religious educational institution, or a religious society, whom it is to employ for any purpose, whom it is to promote for any purpose, or whom it may discharge for any reason.

So this bill is an assault on the wall of separa-

tion which the first amendment was intended to build between civil government and religion.

....

I digress from reading further opinions in this case to emphasize these words:

> The first amendment has erected a wall between church and state. That wall must be kept high and impregnable.

I respectfully submit that this bill would destroy in part the wall between church and state. I submit that it would not keep that wall high and impregnable.

I cannot understand why the EEOC or those who support it are so anxious to extend its powers so that it will have jurisdiction over who is employed by a church to be a janitor, or who is employed to be a secretary for a church, or who is employed — as is done in many instances where religious organizations have fundraising drives — to raise money for them. Yet, this bill would extend the power of the EEOC over these employees of churches; and, as I have said, it would lay the political hands of Caesar upon the things of God.

[T]he first amendment was a design to raise a wall of separation between church and state and was designed to keep the state's hands off the church and the church's hands off the state. Certainly, a bill which is designed to lay the hands of the state on the employment practices of religious denominations is not keeping the hands of the state off the church.

....

Mr. President, I would like to emphasize what Justice Jackson said in his opinion in these words, speaking of the first amendment:

> It was intended not only to keep the state's hands out of religion, but to keep religion's hands off the state.

Congress does not keep the state's — that is, the Government's — hands out of religion by enacting a bill which says that the Government can regulate and control the employment practices of all of the religious groups in this country and all of the religious schools in this country; that is, all of the religious institutions in this country, in respect to all of their employees who are not strictly engaged in carrying out the religious affairs of these institutions.

I submit, without fear of successful contradiction, that if Congress were to enact the bill and thereby say that the Commission can control the employment practices of all religious groups in the United States in respect to what persons may be employed by them, other than those who are engaged strictly in preaching and activities of that kind, that is not keeping the hands of the state off religion. For the life of me, I cannot comprehend why the EEOC and why those who are championing this cause are so greedy for power that they want to lay the political hands of Caesar on the employment practices of churches of God.

Id. at 1977-81 (remarks of Sen. Ervin).[34]

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[34]On February 22, 1972, Senator Ervin offered Amendment No. 860, which would have exempted teachers and other faculty members of the public schools from the coverage of Title VII. *Id.* at 4917. That amendment was defeated by a voice vote. *Id.* On that same day, Senators Ervin and Allen offered Amendment No. 844, which would have removed from the coverage of Title VII all employment practices of all educational institutions. *Id.* at 4919. That amendment also was defeated; this time by a vote of 15 to 70. *Id.*

A review of that legislative history clearly demonstrates to this court that there was a valid legislative purpose behind broadening the amendment to section 702. The legislative goal of assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions is a valid secular purpose.[35] Furthermore, there is no indication that Congress amended section 702 for a religious purpose or to promote religion or religious beliefs. Thus, section 702 passes the first part of the test in *Lemon.*[36] *Compare Stone v. Graham,* 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), *reh'g denied,* 449 U.S. 1104, 101 S.Ct. 904, 66 L.Ed.2d 832 (1981) *with Committee for Public Education*

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[35]In evaluating the legislative purpose, the court is not expressing an opinion as to whether Congress was correct in its evaluation. The court merely is examining the legislative history to determine whether the legislative purpose was secular. The court notes, however, that, in cases involving claims of sexual and racial discrimination and claims of retaliation, federal courts have held that Title VII can and must be applied to the employment practices of religious employers with regard to job positions not involving "minister-like" functions and that no excessive entanglement or impermissible abridgement of free exercise results. In those cases, the courts found, *inter alia,* that the free exercise rights were outweighed by the compelling governmental interest in eliminating discrimination and providing equal employment opportunities.

[36]The court in *Kings* [sic] *Garden, Inc. v. F.C.C.,* 498 F.2d 51 (D.C.Cir. 1974) did not discuss secular purpose but merely concluded that it could not "see what secular purpose is served by the unbounded exemption enacted in 1972." *Id.* at 55. The court in *Feldstein v. Christian Science Monitor,* 555 F. Supp. 974 (D.Mass. 1983) did not make any statements regarding secular purpose; rather, it confined its comments to the following statement:

> It is not mandated under the Constitution that Congress prohibit discrimination on grounds of religion in private sector employment. However, having elected to do so in the Civil Rights Act of 1964, the Congress *is* under a constitutional obligation to do so in a way that neither favors nor

(footnote cont. on p. 41-a)

v. Nyquist, 413 U.S. 756, 773, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948 (1973); *and Lemon v. Kurtzman,* 403 U.S. 602, 613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, *reh'g denied,* 404 U.S. 876, 92 S.Ct. 24, 30 L.Ed.2d 123 (1971). That does not end the inquiry, however, because "the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between church and state." *Nyquist,* 413 U.S. at 774, 93 S.Ct. at 2966.

2. Primary Effect

The defendants contend that the exemption for religious organizations contained in section 702 is neutral and that it is merely an accommodation to first amendment rights. They assert that, if Title VII did not provide such an exemption, it would: (1) interfere with the free exercise of religion and (2) create and establish limitations on religious beliefs, establishing the limits of belief and conscience by state and federal decision, constituting a true establishment. Supporting Memorandum, at 45-53.

It is inevitable that there will be tension between the first amendment's protection of the free exercise of religion and its prohibition against congressional laws respecting an establishment of religion. That tension often makes it impossible "to promote the former without offending the latter." *Nyquist,* 413 U.S. at 788, 93 S.Ct. at 2973. Conse-

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(footnote cont. from p. 40-a)

> disfavors secular, private sector enterprises that may be conducted by religious organizations.... It is well established the expression of a preference for all religions is as constitutionally infirm as a preference for, or a discrimination against, a particular religion.... Either would fly in the face of the terms and requirements of the First Amendment.

Id. at 978-79 (emphasis in original) (citations omitted).

quently, Congress must exercise "some measure of accommodation to avoid the constitutionally impermissible result of totally subordinating either religion clause to the other." *Lanner v. Wimmer,* 662 F.2d 1349, 1352 (10th Cir. 1981).

To accommodate the two religion clauses, the court has adhered to a policy of neutrality, neither advancing nor inhibiting religion.[37] The course of constitutional neutrality is not absolutely straight, however.

> [R]igidity could well defeat the basic purpose of [the religion clauses], which is to ensure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.

Walz, 397 U.S. at 669, 90 S.Ct. at 1411-1412.

It is apparent that "the limits of permissible state accommodation of religion are by no means co-extensive with the

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[37] "The court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other...." *Walz,* 397 U.S. at 668-69, 90 S.Ct. at 1411.

noninterference mandate of the free exercise clause," *Walz,* 397 U.S. at 673, 90 S.Ct. at 1413-1414. However, if a statute goes beyond what is mandated by the free exercise clause in accommodating religion, the statute may no longer maintain the requisite course of constitutional neutrality. If in the process of accommodating the free exercise clause the statute subordinates the establishment clause by sponsoring religion, the statute must be declared unconstitutional. *See Nyquist,* 413 U.S. at 788, 93 S.Ct. at 2973. *Cf. Wisconsin v. Yoder,* 406 U.S. 205, 221, 92 S.Ct. 1526, 1536, 32 L.Ed.2d 15 (1972); *Sherbert v. Verner,* 374 U.S. 398, 409-10, 83 S.Ct. 1790, 1796-1797, 10 L.Ed.2d 965 (1963). Thus, in areas where the religion clauses may conflict with one another, Congress must exercise a great deal of caution in drawing the boundaries of accommodation.[38]

In determining whether Congress has maintained a neutral approach to religion in section 702 or whether Congress has promoted free exercise values at the expense of the establishment clause, something Congress is not constitutionally permitted to do,[39] the court first will address the entanglement issue raised by defendants and then will address the free exercise issue. Finally, the court will discuss whether the direct and immediate effect of section 702 is to

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[38] "'[T]he Supreme Court has repeatedly recognized that exempting religious organizations is a risky business that requires sensitivity to both free-exercise and establishment clause values. In effect, legislatures, agencies, or courts must balance the two values.'" Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Colum.L.Rev. 1514, 1537 (1979).

[39] "'The Supreme Court has held that the Free Exercise Clause itself compels government to make some accommodation to religious realities and needs. So long as government aid goes no further than arguably required by this principle, there is no violation of the separation required by the Establishment Clause.'" *O'Hair v. Andrus,* 613 F.2d 931, 935 (D.C.Cir. 1979) (citations omitted).

advance religion.

The defendants assert that if courts had to determine whether religious organizations were engaging in religious activities with regard to particular employees and, if not, to apply Title VII to them, excessive government entanglement would result.[40] The court does not agree.

In interpreting the Constitution, courts must continually draw fine distinctions. *See Walz,* 397 U.S. at 679, 90 S.Ct. at 1416. The drawing of those fine distinctions in this area does not result in excessive entanglement. *See Wisconsin v.*

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[40]The defendants also contend that by subjecting religious organizations to Title VII for religious discrimination in non-religious jobs, the government has favored those who deviate from the Mormon Church rules and established and favored the plaintiffs. Supporting Memorandum, at 48. The Supreme Court rejected a similar argument in *Bob Jones University v. United States,* 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983).

> Bob Jones University also contends that denial of tax exemption violates the Establishment Clause by preferring religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden. It is well settled that neither a State nor the Federal Government may pass laws which "prefer one religion over another," ... but "[i]t is equally true" that a regulation does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." ... The IRS policy at issue here is founded on a "neutral, secular basis," ... and does not violate the Establishment Clause....

Id. at [604] n. 30, 103 S.Ct. at 2035 n. 30. Although the Court went on to note that "the uniform application of the rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief," there is no indication that the absence of that factor would have changed the Court's decision. *Id.* (citation omitted) (emphasis in original). In this case, although the inquiry is potentially entangling, the entanglement is not excessive.

Yoder, 406 U.S. 205, 215-16, 92 S.Ct. 1526, 1533-1534, 32 L.Ed.2d 15 (1972); *id.* at 237, 240-41, 92 S.Ct. at 1544, 1545-1546 (White, J., concurring).[41] A determination of what is religious activity and what is not does not affect "the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich,* 426 U.S. 696, 713, 96 S.Ct. 2372, 2382, 49 L.Ed.2d 151, *reh'g denied,* 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976). Moreover, it does not involve the court in a continuing comprehensive surveillance of religious organizations. See, *Lemon,* 403 U.S. at 619-20, 91 S.Ct. at 2114-2115.

It is well established that Congress intended Title VII to apply to religiously owned employers, such as the defendants. Under Title VII, religious employers may not discriminate against employees who are not in "minister-like" positions on the basis of race, sex, national origin or in retaliation for the employee's participation in EEOC proceedings. *See, e.g., EEOC v. Pacific Press Publishing Association,* 676 F.2d 1272 (9th Cir. 1982); *EEOC v. Southwestern Baptist Theological Seminary,* 651 F.2d 277 (5th Cir. 1981), *cert. denied,* 456 U.S. 905, 102 S.Ct. 1749, 72 L.Ed.2d 161 (1982). Subjecting religious employers to the administrative requirements and judicial proceedings in those situations does not result in impermissible government entanglement with religion. *See, e.g., Pacific Press,*

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[41] *But cf. Gillette v. United States,* 401 U.S. 437, 457, 91 S.Ct. 828, 840, 28 L.Ed.2d 168 (1971) ("At any rate, it is true that 'the more discriminating and complicated the basis of classification for an exemption — even a neutral one — the greater the potential for state involvement' in determining the character of persons' beliefs and affiliations, thus entangling government in difficult classifications of what is or is not religious, or what is or is not conscientious.") (citation omitted).

676 F.2d at 1278-82; *Southwestern Baptist,* 651 F.2d at 285-86; *EEOC v. Mississippi College,* 626 F.2d 477, 486-89 (5th Cir. 1980), *cert. denied,* 453 U.S. 912, 101 S.Ct. 3143, 69 L.Ed.2d 994 (1981). As the Ninth Circuit stated in *Pacific Press:*[42]

> The present case is distinguishable from *NLRB v. Catholic Bishop* because neither the judgment in this suit nor Title VII's enforcement mechanisms result in any ongoing scrutiny of Press' operations. The potential for ongoing entanglement or continuous supervision of church affairs by the government's regulations is the critical entanglement issue which deserves the most emphasis. In *Catholic Bishop*, 440 U.S. at 502-03 [99 S.Ct. at 1319-1320], ...the court found a serious risk of excessive entanglement because the enforcement of the National Labor Relations Act's mandatory collective bargaining provisions at a sectarian school would have empowered the NLRB to judge the good faith beliefs of clergy-administrators, to assess the validity of positions central to the school's religious mission and to issue cease and desist orders. EEOC cannot issue coercive orders and lacks independent authority to initiate actions to enforce Title VII. As discussed earlier, EEOC actions must be initiated by an employee filing charges with the Commission. Although the district court's award of monetary damages to [the complaining employee] may inhibit Press from discharging employees who par-

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[42]In that case, a female employee charged the defendant, a non-profit corporation which was affiliated with the Seventh-Day Adventist Church, with sex discrimination and retaliatory discharge. The court held that the defendant had violated the employee's rights under Title VII.

ticipate in Title VII proceedings, this remedy does not amount to continuous supervision of the kind the Supreme Court sought to avoid in *Catholic Bishop*.

Although Press insists that *NLRB v. Catholic Bishop, supra,* signals a major change in the Supreme Court's attitude toward regulation of religious institutions, *Catholic Bishop* does not support Press's sweeping position that all employees at a sectarian publishing house are immune from EEOC scrutiny. In a case decided after *Catholic Bishop*, the Fifth Circuit considered the nature of EEOC's intrusion into a sectarian school's operations and found the relationship created between the government and the college was acceptably limited both in scope and effect. *EEOC v. Mississippi College,* 626 F.2d at 487-88. Furthermore, EEOC's relationship to religious employers threatens no more entanglement than other statutes which regulate employee compensation at religious institutions. *See generally Marshall v. Pacific Union Conference of Seventh-Day Adventists,* [1977] Emp. Prac.Dec. (CCH) 7806 (C.D.Cal.1977) (Equal Pay Act); *Mitchell v. Pilgrim Holiness Church Corp.,* 210 F.2d 879 (7th Cir.), *cert. denied,* 347 U.S. [1013], 1103, 74 S.Ct. 867, 98 L.Ed. 1136 (1954) (minimum wage law).

676 F.2d at 1282. *Accord, Southwestern Baptist,* 651 F.2d at 285-86; *Mississippi College,*[43] 626 F.2d at 488. Moreover,

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[43]Language used in the court's analysis in that case raises the question whether the court would have found no excessive entanglement if there would not have been an exemption for all religious discrimination. See *Mississippi College,* 625 F.2d at 487-88. This court believes,

(footnote cont. on p. 48-a)

ascertaining whether an activity is religious or non-religious will require no more government involvement in religion than the concededly non-excessive entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption. *See Walz,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697.

Furthermore, federal courts already analyze questions regarding whether or not to impose liability on religious employers for sex or racial discrimination or retaliation under Title VII by undertaking an analysis of the duties and functions of particular jobs. For courts to apply a similar but more limited analysis, such as the court proposes in this case, to cases of religious discrimination would be no more entangling.

The first case to apply such an analysis was *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir.), *cert. denied,* 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153, *reh'g denied,* 409 U.S. 1050, 93 S.Ct. 513, 34 L.Ed.2d 504 (1972). In *McClure,* (1972), an ordained Salvation Army minister brought suit against the Salvation Army under Title VII, alleging sex discrimination. After determining that the Salvation Army was an employer within the meaning of Title VII, the court determined that the job of minister is a position to which Title VII cannot constitutionally be applied because that position is so religious in nature.[44]

> The relationship between an organized church and its ministers is its lifeblood. The minister is

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(footnote cont. from p. 47-a)

however, that an exemption limited to religious activities would not change the court's resolution of the issue because of the nature of the institution involved and the more limited analysis the court would use in the area of religious discrimination.

[44]The court stated that it was "[r]estricting [its] decision to the Church-minister relationship and expressly refraining from any decision as to other church employees...." *McClure,* 460 F.2d at 555.

> the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection.
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> ....
>
> An application of the provisions of Title VII to the employment relationship which exists between the Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern. Control of strictly ecclesiastical matters could easily pass from the church to the State. The church would then be without the power to decide for itself, free from State interference, matters of church administration and government. Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve persons at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment....

460 F.2d 558-60.

After *McClure*, courts continued to use that analysis in applying Title VII to religious employers. For example, the Fifth Circuit, in *Mississippi College*, rejected the excessive entanglement argument and carefully analyzed the duties

and functions of the faculty at an educational institution owned by the Mississippi Baptist Convention to determine whether the *McClure* exemption for church ministers should apply to such jobs.

> The college is not a church. The college's faculty and staff do not function as ministers. The faculty members are not intermediaries between a church and its congregation. They neither attended to the religious needs of the faithful nor instruct students in the whole of religious doctrine. That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern.

626 F.2d at 485.

In *Southwestern Baptist*, the Fifth Circuit again carefully scrutinized the duties and functions of jobs, this time at a seminary, finding that the faculty were "ministers" under the *McClure* analysis but that the seminary support staff and those administrators "whose function relates exclusively to the seminary's finance and other non-academic departments" were not and therefore were subject to Title VII. 651 F.2d at 284-85.[45] More importantly, when the court rejected the contention that all the seminary's employees served a ministerial function, it observed that

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[45]The court's explanation of why they were not ministers was as follows:

> When churches expand their operations beyond the traditional functions essential to the propogation [sic] of their doctrine, those employed to perform tasks which are not traditionally ecclesiastical or religious are not "ministers" of the "church" entitled to *McClure*-type protection.

651 F.2d at 285.

the status of the employees under Title VII is "a legal conclusion subject to plenary review":

> While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status.

651 F.2d at 283.

As can be seen from those cases, federal courts already employ an analytical framework that distinguishes between degrees of religious responsibility in various jobs in the context of sex and race discrimination or retaliation under Title VII. The court recognizes that the application of the exact same analysis in religious discrimination suits may create the danger of excessive entanglement. The area of religious discrimination may be more sensitive than the area of sex or race discrimination because the type of discrimination involved is intimately connected with the nature and purpose of religious organizations. That does not mean, however, that the court may not inquire at all;[46] it means that the type of inquiry must be less intrusive. The three part test that the court developed and applied in its determination of whether this case, as it relates to Deseret, involves a religious activity, see *supra* pp. 799-802, is the type of test that must be applied in this area[47] to avoid excessive entanglement.[48] That

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[46]In *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the Supreme Court pointed out that "to have the protection of the Religion Clauses, the claim must be rooted in religious belief." *Id.* at 215-16, 92 S.Ct. at 1533, 1534.

[47]Because the extent of the inquiry used in religious discrimination cases would differ from that used in other types of discrimination cases, the results in cases involving the same type of employees may differ. The court does not believe that possibility should preclude religious discrimination cases from being subject to analysis when the mode of analysis does not involve excessive entanglement.

[48]The initial analysis set out in *Southwestern Baptist,* 651 F.2d at

(footnote cont. on p. 52-a)

test gives religious organizations a broader area in which to make religiously discriminatory employment decisions, ensuring that courts do not intrude in decisions that arguably involve matters of church government, faith or doctrine or make determinations as to whether religious beliefs are asserted in good faith or are legitimate. On the other hand, it is not so broad that it distorts the concept of "religious activity."

Hence, the application of Title VII to religious organizations engaging in religious discrimination in secular, non-religious activity does not excessively entangle the government with religious organizations.

The court now will address the defendants' free exercise argument.[49] A court cannot declare a statute unconstitutional as a violation of the free exercise clause simply

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(footnote cont. from p. 51-a)

283, is not unlike the first and second prong of the test used by this court. However, that court did not end its inquiry when it determined that there was a close and substantial tie between the seminary and the church (convention) with regard to financial affairs and control and that the seminary "was an integral part of a church, essential to the paramount function of training ministers who will continue the faith"; instead, it went on to determine whether particular employees were ministers. *Id.* at 283-85. Under this court's test, the inquiry in a religious discrimination case involving that set of facts probably would have ended after the first two prongs were applied.

[49]Amicus Paul E. Reimann suggests that the court lacks "jurisdiction" over this action and in support cites *Serbian East Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151, *reh'g denied,* 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969); *Kedroff v. Saint Nicholas Cathedral,* 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952); and *Watson v. Jones,* 80 U.S. (13 Wall) 679, 20 L.Ed. 666 (1872). Amicus's reliance on those cases and his suggestion is [sic] misplaced. Unlike those cases, this case does not involve internal church conflicts over religious doctrine, practice or discipline. Further-

(footnote cont. on p. 53-a)

because it affects the operation of a religious organization. *Pacific Press*, 676 F.2d at 1279. To determine whether a statute violates the free exercise clause, the court must consider the following factors:

> (1) the magnitude of the statute's impact upon the exercise of religious belief,
> (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and
> (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.

Id. at 1279 (quoting *Mississippi College, 627 F.2d at 488, citing Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)).

There is little doubt that Congress is compelled to exempt religious organizations from Title VII with regard to

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(footnote cont. from p. 52-a)
more, this case does not involve any issue impacting on the relationship between a church and its ministers. Plaintiffs make no challenge to: the decision of the Mormon Church to deny them temple recommends, the Mormon Church's right to set the standards used by that church to make those decisions, the Mormon Church's right or authority to determine whether or not the plaintiffs are members in good standing, the right of the Mormon Church to decide whom it will regard as members or who will best propogate [sic] its doctrine. Neither do the plaintiffs challenge the validity of any of the religious beliefs held by the Mormon Church. What they do challenge is the right of a religious organization to impose religious qualifications as a condition of employment on its employees performing secular, non-religious jobs. Federal courts have consistently held that *Watson* and progeny do not preclude courts from adjudicating Title VII claims against religious employers where the aggrieved employees do not hold positions of ministers. *Pacific Press,* 676 F.2d 1272 (9th Cir. 1982); *Southwestern Baptist,* 651 F.2d 277 (5th Cir. 1981), *cert. denied,* 456 U.S. 905, 102 S.Ct. 1749, 72 L.Ed.2d 161 (1982).

religious discrimination in their religious activities to avoid clashing with the free exercise clause. That is not the issue, however. The question is whether requiring the defendants to refrain from discriminating on the basis of religion in their secular, non-religious activities infringes the free exercise of their religious beliefs. The court does not believe that it does.

Preventing religious discrimination in those instances can have no significant impact on the exercise of "any sincerely held religious belief" of the Mormon Church. *Southwestern Baptist*, 651 F.2d at 286. While the impact on the defendants of prohibiting religious discrimination in secular, non-religious activities could be profound,[50] the relevant injury "is not the impact of the statute upon the institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs." *Mississippi College,* 626 F.2d at 488. None of the affidavits that the defendants submitted even remotely suggest that the Mormon Church holds any religious tenet that requires all persons employed by its corporate entities in secular, non-religious activities to be templeworthy Mormons. Furthermore, such a suggestion would be inconsistent with the representations made by the Mormon Church to the F.C.C. that "it is 'morally evil' to deny anyone the right to employment." *In re Application of Chronicle Broadcasting Co.*, 59 F.C.C.2d 335, 337 (1976). Enforcement of Title VII here

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[50]As the court in *Mississippi College* acknowledged:

> To the extent that the College's practices foster sexual or racial discrimination, the EEOC, if unable to persuade [them to voluntarily alter the practices], could seek a court order compelling their modification, imposing injunctive restraints upon the College's freedom to make employment decisions, and awarding monetary relief to those persons aggrieved by the prohibited acts.

626 F.2d at 488.

therefore does not conflict with the Mormon Church's doctrines or prohibit "an activity 'rooted in religious belief.'" *Pacific Press,* 676 F.2d at 1279 (quoting *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972)).

Even if there were some burden on the exercise of a sincerely held belief, the free exercise clause would not be violated because Title VII's purpose to eliminate all forms of employment discrimination "is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions." *Pacific Press,* 676 F.2d at 1280. As the Supreme Court recently stated in upholding the denial of tax-exempt status to private schools practicing racial discrimination:

> [n]ot all burdens on religion are unconstitutional.... The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.
>
> ....
>
> On occasion this court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct. In *Price v. Massachusetts* [321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944)] ..., for example, the Court found no constitutional infirmity in "excluding [Jehovah's Witness Children] from doing what no other children may do." ... Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.

Bob Jones University v. *United States,* 461 U.S. 574, [603-04], 103 S.Ct. 2017, 2035, 76 L.Ed.2d 157 (1983).

Similarly, in *United States v. Lee,* 455 U.S. 252, 102

S.Ct. 1051, 71 L.Ed.2d 127 (1982), the Supreme Court held that the free exercise clause did not require an exemption from social security taxes for Amish employers, even though the Amish religion prohibits both the acceptance of social security benefits and the payment of contributions by the Amish to the social security system. In finding that the government had a "very high" interest "in assuring mandatory and continuous participation in and contribution to the social security system," *id.* at 258-59, 102 S.Ct. at 1055-1056, the Court pointed out:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.[51]

Id. at 261,[52] 102 S.Ct. at 1057.

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[51]An additional observation by the Court in that case also is pertinent in this case: "Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." 455 U.S. at 261, 102 S.Ct. 1057.

[52]Justice Stevens, in his concurring opinion, stated:

> Today's holding is limited to a claim to a tax exemption. I believe, however, that a standard that places an almost insurmountable burden on any individual who objects to a valid neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) better explains most of this court's holding than does the standard articulated by the Court today.

Id. at 261, 263 n. 3, 102 S.Ct. at 1057-1058 n. 3 (Stevens, J., concurring in judgment).

The Ninth Circuit recently affirmed that Congress' compelling interest in eradicating discrimination is sufficient to justify any actual burden that Title VII's application to secular, non-religious activities would impose on the exercise of sincerely held religious beliefs. See *Pacific Press,* 676 F.2d at 1280-81; *Mississippi College,* 626 F.2d at 489. In *Pacific Press,* there was a clear and acknowledged conflict between a religious doctrine and the enforcement of Title VII.[11] Despite that conflict, the Ninth Circuit held that the policies embodied in Title VII were sufficiently compelling to justify the burden.

> [T]here is a substantial impact on the exercise of religious beliefs because EEOC's jurisdiction to prosecute the retaliation action taken against Tobler potentially will impose liability on Press for disciplinary action based on religious doctrine. We find, however, that the government's compelling interest in assuring equal employment opportunities justifies this burden. By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a "highest priority."

676 F.2d at 1280.

Finally, an exemption from Title VII for discrimination in secular, non-religious activities would seriously undermine Congress' attempt to eliminate discrimination. To permit religious organizations to engage in religious discrimination in all their secular, non-religious activities

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[11]In that case, the plaintiff asserted that the defendant had discriminated against her on the basis of sex and that she had been fired in retaliation for having filed the sex discrimination charge. In defending against the retaliation claim, the defendant justified the plaintiff's dismissal on the ground that she violated a doctrine of the Seventh-Day Adventist Church that prohibits lawsuits by members against the church. 696 F.2d at 1280.

would "withdraw Title VII's protection from employees at the hundreds of diverse organizations affiliated with [religious entities], including businessses which process food, sell insurance, invest in stocks and bonds, and run schools, hospitals, laboratories, rest homes and sanitariums." *Pacific Press,* 676 F.2d at 1280. *See also Mississippi College,* 626 F.2d at 489. To allow discrimination to go on in all those activities involving all those employees would impede achievement of the important objectives of Title VII.

Hence, when Congress exempted religious organizations from Title VII with regard to religious discrimination in secular, non-religious activities, it was not constitutionally compelled to do so. The court consequently must determine whether Congress' "accommodation" to the free exercise clause results in a direct and immediate advancement of religion in violation of the establishment clause.

It is well settled that "any program which in some manner aids an institution with religious affiliation" does not necessarily violate the establishment clause. *Mueller v. Allen,* 463 U.S. 388, [393], 103 S.Ct. 3062, 3065, 77 L.Ed.2d 721 (1983). The aid must further the evils against which the establishment clause was designed to protect — "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission of the City of New York,* 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970). *See Mueller,* 463 U.S. at [399], 103 S.Ct. at 3068. The aid, however, must do more than remotely or incidently advance or inhibit religion. *See Walz,* 397 U.S. at 674-76, 90 S.Ct. at 1414-1415. *See also, Everson v. Board of Education,* 330 U.S. 1, 15-18, 67 S.Ct. 504, 511-513, 91 L.Ed. 711 (1947). It must have the "primary effect" of advancing or inhibiting religion. *See Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, *reh'g denied,* 404 U.S. 876, 92 S.Ct. 24, 30 L.Ed.2d 123 (1971).

In focusing on the term "primary effect," however, it is not possible or necessary for courts to engage in metaphysical judgments as to whether the "primary effect" of a particular law is to promote legitimate secular objectives or to advance religion. *Committee for Public Education v. Nyquist,* 413 U.S. 756, 783 n. 39, 93 S.Ct. 2955, 2971 n. 39 (1973). Rather, the proper inquiry is whether the law in question has the direct and immediate, or substantial, effect of advancing or inhibiting religion. See *id.* at 783-84 n. 39, 93 S.Ct. at 2971 n. 39; *Mueller*, 463 U.S. at [405, 409], 103 S.Ct. at 3072 (Marshall, J., dissenting).

> In *McGowan v. Maryland,* 366 U.S. 420 [81 S.Ct. 1101, 6 L.Ed.2d 393] (1961), Sunday closing laws were upheld, not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead approval flowed from the finding, based on a close examination of the history of such laws, that they had only a remote and incidental effect advantageous to religious institutions.... Likewise, in [*Abington Township v.] Schempp* [374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)] the school authorities argued that Bible-reading and other religious recitations in public schools served, primarily, secular purposes, including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." ... Yet, without discrediting these ends and without determining whether they took precedence over the direct religious benefit, the Court held such exercises incompatible with the Establishment Clause.... Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton [v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29

> L.Ed.2d 790 (1971)] in which the plurality found that the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "*in part* have the effect of advancing religion." ...
>
> [S]ecular objectives, no matter how desirable and irrespective of whether judges might possess sufficiently sensitive calipers to ascertain whether the secular effects outweight the sectarian benefits, cannot serve today any more than they could 200 years ago to justify such a direct and substantial advancement of religion.

Nyquist, 413 U.S. at 784-85 n. 39, 93 S.Ct. at 2971 n. 39.

The court in *King's Garden, Inc. v. Federal Communications Commission,* 498 F.2d 51 (D.C.Cir. 1974), in dictum, concluded that section 702 is unconstitutional. The focus of the court's analysis was on the exemption's primary or direct and immediate effect.

> [T]he exemption invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion.[54]

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[54]In reaching that conclusion, the *King's Garden* court explained as follows:

> In covering all of the "activities" of any "religious corporation, association, educational institution, or society," the exemption immunizes virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act. If owned and operated by a non-religious organization, the enterprise could not use sectarian criteria in hiring, except where the particular job position carried a "bona fide occupational qualification" of a religious character.

King's Garden, Inc. v. F.C.C., 498 F.2d 51, 54-55 (D.C.Cir. 1974).

....

> It was not of course, constitutionally required that Congress prohibit religious discrimination in private sector employment. But this having been done, by the Civil Rights Act, the wholesale exemption for religious organizations alone can only be seen as a special preference....[15] The First Amendment demands "neutrality" of treatment between religious and non-religious groups....

Id. at 55. The District of Columbia Circuit Court's criticism is well founded.

The Supreme Court consistently has found it significant that an exemption or benefit was provided to a broad spectrum of groups and was not limited to religious institutions. Most recently, in *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), the Supreme Court found it particularly important that the state law in question[16] per-

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[15]A legal commentator also has reached that conclusion:

> An example of a statutory benefit that impermissibly relies on religious criteria is the present religious exemption in Title VII, which permits a religious organization to practice employment discrimination on the basis of religion in any of its activities. This exemption runs afoul of the establishment clause, because it singles out religious organizations for preferential treatment and thus confers a benefit or withholds a burden on the basis of a purely religious classification.

Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations[,] 79 Colum. L.Rev. 1514, 1547-48 (1979).

[16]In *Mueller,* the Supreme Court was reviewing a Minnesota law that permitted state taxpayers to claim a deduction from gross income for actual expenses incurred for the "tuition, textbooks and transportation" of dependents attending elementary or secondary schools. The deduction was limited to $500 per dependent in grades one through six and $700 per dependent in grades seven through twelve. *Mueller,* at [391], 103 S.Ct. at 3064. The plaintiffs contended that the law violated the establishment clause by providing financial assistance to sectarian schools. *Id.*

mitted "*all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools," to deduct educational expenses. *Id.* at [397], 103 S.Ct. at 3068 (emphasis in original)."

> Just as in *Widmar v. Vincent* [454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)] ... where we concluded that the State's provision of a forum neutrally "open to a broad class of nonreligious as well as religious speakers" does not "confer any imprimatur of State approval," so here: "the provision of benefits to so broad a spectrum of groups is an important index of secular effect." *[Ibid.]*
>
> In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants, was provided only to parents of children in *nonpublic* schools. This fact had considerable bearing on our decision striking down the New York statute at issue.... [W]e intimated that "public assistance ... made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution," ...might not offend the Establishment Clause. We think the tax deduction adopted by Minnesota is more similar to this latter type of program than it

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"The Court appears to engage in a two part analysis in that case. It first looked at the characteristics of the tax deduction to determine whether they indicated that the aid to religion was direct or indirect. Having found that the tax deduction was an "attenuated financial benefit flowing to parochial schools," the Court then examined the deduction to see if it furthered any of the evils "against which the Establishment Clause was designed to protect." *Id.* at [399], 103 S.Ct. at 3069.

> is to the arrangement struck down in *Nyquist*. Unlike the assistance at issue in *Nyquist*, § 290.09(22) permits *all* parents — whether their children attend public school or private — to deduct their children's educational expenses. As *Widmar* and our other decisions indicate, a program, like § 290.09(22), that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

Id. at [397-98], 103 S.Ct. at 3068-3068 [sic] (emphasis in original).[58]

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[58]The *Mueller* Court found two other characteristics of the state law important, neither of which is present here. First section 290.09(22) was only one of many deductions. In discussing that feature, the court stated:

> Our decisions consistently have recognized that traditionally "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes," ...in part because the "familiarity with local conditions" enjoyed by the legislators especially enables them to "achieve an equitable distribution of the tax burden." ... Under our prior decisions, the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden on its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference.

Id. at [396], 103 S.Ct. at 3067. Defendants here argue that Title VII as a whole contains a number of exemptions and that Congress has carefully drafted the whole statute, making policy decisions about the scope of Title VII and its applications to various types of situations throughout its provisions. Supporting Brief, at 18. Those attempts to narrow the distinctions between section 702 and the laws at issue in *Walz* and *Mueller* are without merit.

The second feature that the Court found significant was that the assistance to parochial schools was channeled through individual parents. "Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval,' ...can be deemed to have been conferred on any particular religion, or on religion generally." *Mueller*, at [399], 103 S.Ct. at 3069. Here the benefit is conferred directly on religious organizations.

In *Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973), the Supreme Court struck down a New York law[59] which provided financial assistance, in several ways, to nonpublic elementary and secondary schools in the state as an advancement of religion in violation of the establishment clause. In doing so, the Court distinguished the laws in three cases in which the Supreme Court had approved a form of financial assistance that conferred benefits on private, sectarian schools:[60]

> *Allen and Everson* differ from the present litigation in [an] important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. See also *Tilton v. Richardson, supra,* in which federal aid was made available to *all* institutions

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[59]The law in question established three distinct financial aid programs for nonpublic elementary and secondary schools. The first program provided "for direct money grants from the state to 'qualifying' nonpublic schools to be used for the 'maintenance and repair of ... school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.'" *Nyquist,* 413 U.S. 762, 93 S.Ct. at 2960 (citation omitted). The second program provided for a tuition reimbursement plan for parents of children attending nonpublic elementary or secondary schools. The third program provided tax relief to those who did not qualify for tuition reimbursement.

[60]Those cases were *Tilton v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); *Board of Education v. Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) and *Everson v. Board of Education,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). In *Everson,* the Court approved a program that provided reimbursements to parents of public as well as parochial school children for bus fares paid in connection with transportation to and from school. In *Allen,* the Court upheld a law authorizing the provision of secular textbooks for all children in grades seven through twelve attending public and nonpublic schools. In *Tilton,* the Court approved federal grants of funds for the construction of facilities to be used for clearly secular purposes by public and nonpublic institutions of higher learning.

> of higher learning....

413 U.S. at 782 n. 38, 93 S.Ct. at 2970 n. 38.[61] The *Nyquist* Court used the same reasoning to distinguish another one of its cases in which it rejected a challege to a law on establishment grounds:

> The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead the exemption covered all property devoted to religious, educational, or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefitted class would be an important factor.

Id. at 794, 93 S.Ct. at 2976.

The Supreme Court also acknowledged the importance of the scope of an exemption in *Walz v. Tax Commission of the City of New York,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

> [The New York legislature] has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad

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[61]Another factor that was important to the *Nyquist* Court was that there were no appropriate restrictions on the benefits to ensure that the state aid would be used exclusively for secular, neutral and non-ideological purposes. See *Nyquist,* 413 U.S. at 774-85, 93 S.Ct. at 2966-2972. This court has the same complaints about section 702.

> class of property owned by nonprofit, quasipublic corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest....

Id. at 672-73, 90 S.Ct. at 1413.[62]

In addition to not being facially neutral, section 702 also lacks other characteristics that the Supreme Court has looked to in declaring statutes valid as against claims of establishment clause violations. In *Walz,* the Supreme Court stressed the peculiar historical role of property tax exemptions for places of worship.[63] *Walz,* 397 U.S. at 676-78, 90 S.Ct. at 1415-1416, and observed that "[n]othing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of religious belief." *Id.* at 678, 90 S.Ct. at 1416. In contrast,

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[62]The *Walz* Court noted that the "[e]limination of the exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes," 397 U.S. at 674, 90 S.Ct. at 1414. Although elimination of the exemption for religious organizations with regard to religious discrimination in its secular, nonreligious activities would increase government involvement, that involvement is not excessive. Furthermore, the court cannot believe that the *Walz* Court intended the factor of increased involvement to be the determinative issue.

[63]The reason underlying the long history of tolerance of tax exemptions for houses of worship was the recognition that taxation could be one form of hostility toward religion and that actual exemption from taxation constituted "a reasonable and balanced attempt to guard against those dangers." *Walz,* 397 U.S. at 673, 90 S.Ct. at 1413.

no historical tradition supports the 1972 exemption[64] and there are no similar hostility-based reasons underlying the history of the exemption contained in section 702. Furthermore, the abolition of the governmental exclusion for religious organizations' religious discrimination in secular, non-religious activities does not present any conflict with the free exercise clause. Consequently, the principal of accommodation espoused in *Walz* has little relevance here.

In fact, in this case, rather than conflicting, the two clauses compliment each other and dictate the same result. Abolition of the exclusion for non-religious, secular activities enhances rather than violates the free exercise clause; it keeps religious institutions from being permitted to burden the free exercise rights of nonmembers who seek employment in non-religious jobs. *See Sherbert v. Verner,* 374 U.S. 398, 409, 83 S.Ct. 1790, 1796, 10 L.Ed.2d 965 (1963)[65] Furthermore, allowing the exemption to be applied in secular, non-religious activities creates the type of coercion and restricted alternatives that the Supreme Court found absent from the Sunday closing laws that it validated in *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

> In *McCollum*, state action permitted religious instruction in public school buildings during school

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[64]Although the Court acknowledged that long use does not result in a vested or protected right in violation of the Constitution, it also stated that "an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." *Id.* at 678, 90 S.Ct. at 1416.

[65]In rejecting a claim that the Court would be fostering the establishment of the Seventh-Day Adventist religion by extending unemployment benefits to Sabbatarians, the Court in *Sherbert* made the following observations: "[T]he recognition of the appellant's right to unemployment benfits under the state statute does not serve to abridge any other person's religious liberties." 374 U.S. at 409, 83 S.Ct. at 1797. The same is not true in this case.

> hours and required students not attending the religious instructions to remain in their classrooms during that time. The Court found that this system had the effect of coercing the children to attend religious classes; no such coercion to attend church services is present in the situation at bar. In *McCollum*, the only alternative available to the nonattending students was to remain in their classrooms; the alternatives open to nonlaboring persons in the instant case are far more diverse.

Id. at 452, 81 S.Ct. at 1119.

Finally, there is no need in this case to protect religious organizations from the burdens of secularism. *See Wisconsin v. Yoder,* 406 U.S. 205, 234-235 n. 22, 92 S.Ct. 1526, 1542-1543 n. 22, (1972); *Sherbert v. Verner,* 374 U.S. 398, 409, 83 S.Ct. 1790, 1796, 10 L.Ed.2d 965 (1963).[46] As the court in *King's Garden* observed:

> It is conceivable that there are "many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism." ... But it hardly follows that the state may favor religious groups when they themselves *choose* to be submerged, for profit or power, in the "all-embracing secularism" of the

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[46]In *Yoder*, the Court rejected an establishment claim and in doing so, stated:

> Accommodating the religious beliefs of the Amish can hardly be characterized as sponsorhip or active involement. The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society ... to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose....

Yoder, 406 U.S. at 234-35 n. 22, 92 S.Ct. at 1543 n. 22.

> corporate economy.

King's Garden, 498 F.2d at 57 (emphasis in original). Thus, section 702 is devoid of any of the important characteristics on which the Supreme Court has relied in upholding statutes against establishment clause claims.

Having determined that section 702 does not possess any of the characteristics that the Supreme Court has looked to in upholding statutes against establishment clause claims, the court now turns to the question whether section 702 furthers any of the evils against which the establishment clause was designed to protect — "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz*, 397 U.S. at 668, 90 S.Ct. at 1411.

Even though exemptions are generally one of the least direct forms of aid to religion, *Kosydar v. Wolman*, 353 F.Supp. 744, 763 (S.D.Ohio 1972), *aff'd sub. nom., Grit v. Wolman*, 413 U.S. 901, 93 S.Ct. 3062, 37 L.Ed.2d 102, (1973), the Supreme Court has stated that "[t]he Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 220-21, 92 S.Ct. 1526, 1536, 32 L.Ed.2d 15 (1972). In the opinion of this court the exemption provided in section 702 for secular, non-religious activities has done just that by directly and immediately furthering the sponsorship of religion by government.

While the establishment clause's condemnation of "sponsorship" ususally is aimed at financial sponsorship,

> in drafting the Clause the Founders were taking equally keen aim at all non-financial 'sponsorship' of religious organizations by government.... And sponsorship is what this exemption accomplishes. It is a sure formula for concentrating and vastly extending the worldly influences of

> those religious sects having the wealth and inclination to buy up pieces of the secular economy.[67]

King's Garden, 498 F.2d at 55.[68] Hence, the exemption contained in section 702, as applied to secular, non-religious activities, violates the establishment clause by granting religious organizations an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices. Section 702 therefore is invalid as applied to secular non-religious activities, and defendants' motion to dismiss, or, alternatively for summary judgment, must be denied as it relates to the First and Second Causes of Action of the complaint.

3. *Excessive Entanglement*

Given the court's determination under the second prong of the *Lemon* test, application of the third prong of that test is not necessary to this decision. Nevertheless, and inasmuch as the court believes that application of the third prong will further demonstrate the problems that the broad exemption in section 702 creates, the court will undertake such an analysis.

Courts continually talk about maintaining the wall between church and state. However, "total separation is not possible in an absolute sense"; it is inevitable that there will be "[s]ome relationship between government and religious organizations." *Lemon,* 403 U.S. at 614, 91 S.Ct. at 2112. The line of separation that must exist between the two "is a blurred, indistinct, and variable barrier depending on all

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[67]The court in *King's Garden* noted that, in many American religious groups, the wealth and inclination apparently exists. [sic] 498 F.2d at 55 n. 9.

[68]The court cannot find any benefits, such as the court in *Mueller* found, to offset "whatever unequal effect may be attributed to the statutory classification" in section 702. *Mueller,* 463 U.S. at [402], 103 S.Ct. at 3070.

the circumstances of a particular relationship." *Id.* To determine whether a particular law crosses that line and excessively entangles the government with religious organizations, the court "must examine the character and purpose of the institutions that are benefitted, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority." *Lemon,* 403 U.S. at 615, 91 S.Ct. at 2112.

The institutions that are benefitted by the exemption provided in section 702 are, by definition, all religious corporations, associations, educational institutions and societies. Even though the exemption is directed only at religious organizations, the purpose and character of the institutions benefitted and affected by the exemption extends beyond those entities to any other institution through which the religious organizations perform their "activities." Thus, the character and purpose of both the religious organizations and their activities must be assessed.

The primary purpose of religious organizations, obviously is to carry on religious rituals, teach religious doctrine and proselytize. They, however, may engage in both religious and secular activities, and the institutions they acquire to carry on their activities may be religious and/or secular in nature and purpose. In this particular case, the Mormon Church's primary purpose is the same as any other religious organizations [sic] — religious. The defendants are corporation soles [sic] of the Mormon Church which were formed to facilitate Mormon Church activities. They therefore are an integral part of the Mormon Church. The defendants, however, engage in both religious and secular activities and have acquired various institutions to carry out those activities. They can exercise complete control over all aspects of any institutions they acquire. With respect to the institution at issue here, Deseret, the record shows that they exercise a significant amount of control over Deseret's affairs.

The purpose of Deseret is to provide facilities for physical exercise in an atmosphere reflecting the standards of the Mormon Church. Its purpose, as discussed earlier, is secular. Deseret is not an integral part of the religious mission of the Mormon Church, although it is a desirable accommodation to certain values that the Mormon Church professes to be good. However, the vast control the Mormon Church exercises over Deseret through the defendents creates a situtation where the religious beliefs of the Mormon Church can be furthered through Deseret, as well as any other institution it acquires and controls. This potential for furthering religious beliefs and adherence to Mormon Church doctrine is enhanced by the fact that people's opportunity to earn a living is at stake. Thus, this first factor weighs against the defendents.

As to the second consideration, the nature of the aid provided by section 702 is an exemption from the application of Title VII that permits all religious entities to discriminate on the basis of religion in their employment practices and policies. That exemption poses a danger to the separation between church and state. Section 702 involves institutions whose legitimate needs are growing and whose interests have substantial political support. Religious organizations can and do engage in a variety of activities today, ranging from totally religious to purely commercial. Those activities, whether religious or secular, exist in a system dedicated to furthering religious belief and ritual. Religious authority necessarily pervades all the activities in which a religious organization engages.

A religious organization can and, as this case demonstrates, does exercise control over every person it employs. Through the control it maintains over its activities, financially and in day-to-day operations, the religious organization can subject all the employees to the direction and discipline of religious authorities. Those religious authorities can ensure that every employee in

every one of its activities is a practicing member of its religious faith. Further, it can refuse to hire and even fire anyone who cannot and will not remain a member in good standing in its church. Under section 702, the government has given religious organizations the authorization to exercise that type of coercive power.

Although a religious organization may never abuse section 702 to foster religion,[69] there is a potential if not an actual hazard created by this type of aid. Inevitably some of the activities in which religious organizations engage will hover on the border between secular and religious, and some activities will be purely secular.

The court does not assume that religious organizations will be guilty of bad faith or any conscious design to impose their beliefs on the population through employment. It simply recognizes that dedicated religious authorities, who are responsible for running religious organizations affiliated with their faith and created and operated to benefit their religion, will inevitably experience great difficulty in not advancing their religion through employment practices. With the best of intentions, religious authorities in charge of the activities of the religious organization would find it difficult to totally separate their religious beliefs from their ideas regarding valid business practices. What would appear to some to be essential to carrying on an activitiy might well for others border on or constitute coercive religious discrimination practices.

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[69]If a religious organization has the finances and desires to coerce adherence to its religious beliefs and support for its faith, it could purchase commercial enterprises and impose religious qualifications on all its employees. Employees living in communities in which religious organizations engaged in such conduct would be forced to conform to the religious requirements if they wanted a job. This is purely hypothetical however, and there is no evidence in this case that the defendents are using or ever would use section 702 to further its religion.

It may well be that religious authorities running religious organizations will be successful in their attempts to segregate their religious beliefs from their responsibilities regarding what types of conditions and qualifications they should impose on employees performing various activities. No assumption is made otherwise. However, the fact remains that the potential for impermissible fostering of religion is present. Congress cannot provide a federal exemption for religious organizations based on an assumption that religious authorities running religious organizations will avoid using section 702 to further religious beliefs. *See Lemon*[,] 403 U.S. at 619, 91 S.Ct. at 2114. *See also Nyquist,* 413 U.S. at 778-79, 93 S.Ct. at 2968-2969. Congress must be certain, given the religion clauses, that by enacting an exemption it does not grant power to religious authorities to establish a religion. *See Lemon,* 403 U.S. at 619, 91 S.Ct. at 2114. Congress has not sought to ensure that no trespass occurs by restricting the exemption. Thus, this second factor also tends toward a finding of excessive entanglement.

The final inquiry is the relationship that section 702 creates between the government and religious authorities and here the court is of the opinion that the relationship between the two is not excessive. Section 702 does not require the type of comprehensive, discriminatory and continuing state or federal surveillance that was condemned in cases such as *Lemon.* It does not require an inspection or evaluation of religious organizations or surveillance of employees, as the law in *Lemon* required and empowered the state to do. On the converse, this exemption was designed to minimize involvement and entanglement between church and state[79] and to ensure that the government and

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[79]The court notes that the entanglement that would result if federal agencies and the courts were required to decide what activities are religious and what activities are not is not the type of entanglement prohibited by the first amendment. See *supra* pp. 812-816.

courts do not go through the rigors of inspecting and analyzing whether the activities in which a religious entity is engaging are religious or secular, thus avoiding an intimate and continuing relationship between church and state. See *Walz,* 397 U.S. at 674, 698-99, 90 S.Ct. at 1414, 1426-1427. In addition, the type of aid afforded by section 702 does not involve entanglement in "the broader sense of continuing political strife over aid to religion." *Nyquist,* 413 U.S. at 794, 93 S.Ct. at 2976. *Cf. Lemon,* 403 U.S. at 622-23, 91 S.Ct. at 2115-2116 ("The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and population grow.") Section 702 creates a status under federal antidiscrimination law for the benefit of all religious groups. That "kind and degree of government involvement in religious life" is not "apt to lead to strife and frequently strain a political system to the breaking point." *Walz,* 397 U.S. at 694, 90 S.Ct. at 1424.[71] Consequently, this third factor favors a finding of no entanglement.

If the court had to balance those three factors, it is not clear which way the balance would tip. The court, however, will not attempt such a process in light of its finding that the direct and immediate effect of the exemption of religious organizations from Title VII for religious discrimination in secular, non-religious activities is to advance religion in violation of the establishment clause of the first amendment to the United States Constitution.

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[71]In *Lemon,* the laws in question created the need for successive and permanent annual appropriations that only benefitted a few religious groups.

C. Due Process and Equal Protection Claims

The defendants have moved to dismiss the plaintiffs' claims that are predicated on the due process and equal protection clauses of the United States Constitution. After carefully reading the defendants' arguments directed to those claims, see Supporting Memorandum, at 57-59, and after finding that the plaintiffs have not responded to the arguments, the court has concluded that it would be inappropriate to rule on those claims at this time. Therefore, ruling is reserved on the defendants' motion thereon until the parties have had an opportunity to further present their positions to the court.

III.

State Claims for Relief

In their third claim for relief, plaintiffs allege that the defendants terminated plaintiffs wrongfully and without cause by terminating their employment because of their inability or unwillingness to meet the worthiness requirements of the Mormon Church for a temple recommend. Complaint, at 14. The plaintiffs seek compensatory and exemplary damages for such allegedly wrongful termination. *Id,* at 16—17. In their fourth claim for relief, plaintiffs allege that the defendants intentionally and wrongfully inflicted extreme mental and emotional injury and distress on plaintiffs by subjecting the plaintiffs to the Mormon Church requirement and thereafter threatening to fire and firing plaintiffs due to their inability or unwillingness to satisfy the worthiness requirement. *Id.* at 15. The plaintiffs seek compensatory and exemplary damages for that alleged tortious conduct. *Id.* at 17. If plaintiffs have a cause of action against the defendents under either or both of those claims for relief, it clearly arises under state law.

It is well established that a federal district court has broad discretion as to whether or not to accept jurisdiction

over a pendent claim when a plaintiff has plead [sic] a valid federal cause of action. See *United Mine Workers v. Gibbs,* 383 U.S. 715, 85 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The plaintiffs have stated a federal cause of action, and the court deems it appropriate to assume jurisdiction over the pendent claims.

A. Wrongful Discharge Claim Under Utah Law

To determine whether the plaintiffs have stated a valid cause of action for wrongful discharge, the court must look to Utah law. The law in Utah is that a contract employing a person without any agreement as to period of service is to be deemed a hiring at will subject to termination at the will of either party. In its most recent pronouncement, the Utah Supreme Court continued to adhere to the termination-at-will doctrine and implied that it would not recognize a claim for wrongful discharge.

> The general rule concerning personal employment contracts is, in the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, the contract is no more than an indefinite general hiring which is terminable at the will of either party.... When an ... individual is hired for an indefinite time, he has no right of action against his employer for breach of the employment contract upon being discharged.

Bihlmaier v. Carson, 603 P.2d 790, 792 (Utah 1979). Plaintiffs do not assert that they were anything more than employees at will. Rather, they ask this court to follow the trend of other courts that have created exceptions to the

terminable-at-will doctrine.[72] In particular, the plaintiffs contend that they must be allowed redress in the form of a wrongful discharge cause of action because the firing of plaintiffs for religious reasons violates the compelling national policy against religious discrimination.

Although this court has the duty and power to mold the laws of this state when applying uncertain state law, *McKinney v. National Dairy Council,* 491 F.Supp. 1108, 1118-22 (D.Mass. 1980),[73] it may not change existing state law. The plaintiffs argue that none of the Utah cases that defendants cite is dispositive because in none of the cases was the Utah Supreme Court asked to recognize a wrongful discharge cause of action. However, the long history of the Utah Supreme Court's recognition of the terminable-at-will doctrine, the language the court has used in dismissing those cases and the failure of the court to ever suggest that it might recognize an exception to that rule lead this court to the conclusion that the recognition of an exception to the

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[72]Courts recently have judicially created an exception to the terminable-at-will doctrine where the reason an employee was fired violates an important public policy. *See e.g., Brown v. Transcon,* 284 Or. 597, 588 P.2d 1087 (1978) (discharge for filing claim for workmen's compensation); *Nees v. Hocks,* 272 Or. 210, 536 P.2d 512 (1975) (discharge for performing jury duty); *Petermann v. International Brotherhood of Teamsters,* 174 Cal.App.2d 184, 344 P.2d 25 (1959) (termination for refusal to commit perjury). *But cf.,* Annot., 9 A.L.R. 4th 329, at § 3[b] (1981 & Supp. 1983). See generally, Annot. 12 A.L.R. 4th 544 (1982 & Supp. 1983).

[73]The court believes that *McKinney* is distinguishable because in that case, the Superior Judicial Court of Massachusetts had recognized in one case that the contract contained an implied covent [sic] of good faith and fair dealings and the federal court applied that finding to the case before it. Here, the Utah Supreme Court has never recognized an exception to the terminable-at-will doctrine in any of its cases and has not indicated that it would recognize an exception under certain circumstances.

terminable-at-will doctrine would be a change in Utah law. *See Bihlmaier v. Carson,* 603 P.2d 790, 792 (Utah 1979) ("When an individual is hired for an indefinite time, he has no right of action against his employer for breach of the employment contract upon being discharged."); *Crane Co. v. Dahle,* 576 P.2d 870, 872 (Utah 1978) ("In the absence of a contract for a definite term, an employer may quit whenever he desires, the same as the employer may fire him."); *Held v. American Linen Supply Co.,* 6 Utah 2d 106, 307 P.2d 210, 211 (1957) ("Whether [an employee] has a cause of action if she were discharged without just cause depends upon the terms of the contract, either express or implied...."). The Utah Supreme Court may decide to recognize an exception in the future, but this court is not at liberty to determine what Utah law ought to be. Thus, the plaintiffs' third claim for relief based on wrongful discharge must be dismissed.

B. Intentional Infliction of Emotional Injury Claim

The Utah Supreme Court has recognized the existence of a cause of action for the intentional infliction of emotional distress. To state a cause of action for such a tort, the following standard must be met:

> Our study of the authorities, and of the arguments advanced, convinces us that, conceding such a cause of action may not be based upon mere negligence, the best considered view recognizes an action for severe emotional distress, though not accompanied by bodily impact or physical injury, where the defendant intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting the emotional distress, or (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend

> against the generally accepted standards of decency and morality.

Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344, 346-47 (1961). The Utah Supreme Court has continued to follow that rule. *Covert v. Kennecott Copper Corp.,* 23 Utah 2d 252, 461 P.2d 466, 468 (1969).

The plaintiffs claim that the following acts constitute a basis upon which recovery for intentional infliction of emotional distress can be sustained:

> 50. In connection with the CORPORATIONS' demand that they satisfy the Mormon worthiness requirement, plaintiffs were obligated to respond to certain inquiries formally put to them by authorities of the Mormon Church. These inquiries were intensely personal and intimate in nature, and they necessitated answering questions concerning, among others, the following:
>
> > (a) plaintiffs' sexual activities;
> > (b) plaintiffs' moral cleanliness and purity;
> > (c) plaintiffs' income and his or her past and future contributions to the Mormon Church; and
> > (d) plaintiffs' past and future obedience and allegiance to, and support of Mormon leaders.
>
> 51. Upon information and belief, the CORPORATIONS' purpose in imposing upon plaintiffs the Mormon worthiness requirement included the following:
>
> > (a) to impose Mormon beliefs and practices upon plaintiffs by means of economic coercion, i.e., by means of extending or withholding employment, the nature of which employment is secular and without

> religious significance;
> (b) to exact from plaintiffs' a portion of their wages as tithes in return for extending to plaintiffs the opportunity for continued employment; and
> (c) to exact religious obedience from plaintiffs, and to impair their freedom of thought and expression.

Complaint, C-83-0492W, at 14-15 (Apr. 4, 1983). Whether or not the plaintiffs' allegations are sufficient to meet the first requirement of Utah's standard, the court is of the opinion that, taking the allegations as true, the plaintiffs cannot meet the second requirement.

The Utah court has not extensively discussed what it means by the term "outragous and intolerable" actions. It, however, has cited approvingly to section 46 of the Restatement of Torts. See *Samms,* 358 P.2d at 357 n. 14.[74] Comment d to section 46 of the Restatement (Second) of Tort states, in relevant part:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

Restatement (Second) of Torts, § 46, comment d. Regardless of how the court feels about the appropriateness

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[74]Even though that cite is to section 46 of the Restatement of Torts, the court sees no reason why the Utah court would disapprove of Section 46 of the Restatement (Second) of Torts.

of the defendants' conduct and, even though the plaintiffs may have been embarrased, distressed and humiliated, the court concludes, as a matter of law, that the defendants' conduct does not rise to the level of "outrageous and intolerable conduct" contemplated by the Utah Supreme Court. Thus, the plaintiff's fourth cause of action must be dismissed.

Accordingly,

IT IS HEREBY ORDERED as follows:

1. The defendants' motion to dismiss or, in the alternative, for summary judgment is denied as it relates to the state and federal discrimination claims contained in First and Second Claims for Relief.

2. The defendants' motion to dismiss or, in the alternative, for summary judgment is reserved with regard to the due process and equal protection claims contained in the First and Second Claims for Relief pending further action by the parties.

3. The defendants' motion to dismiss or, in the alternative, for summary judgment is granted with regard to the wrongful discharge claim asserted in the Third Claim for Relief.

4. The defendants' motion to dismiss or, in the alternative, for summary judgment is granted with regard to the emotional injury claim alleged in the Fourth Claim for Relief.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CIV. NO. C-83-0492W

CHRISTINE J. AMOS, JUDY BAWDEN, DENIECE KANON, APRIL JOYCE RIDING, AND ARTHUR FRANK MAYSON, RUTH ARRIOLA, SHELLEEN ADAMSON AND RALPH L. WHITAKER ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
PLAINTIFFS,

v.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, AND THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
DEFENDANTS,

UNITED STATES OF AMERICA,
INTERVENOR.

ORDER AND FINAL JUDGMENT

The above-entitled matter came on for hearing pursuant to notice on plaintiffs' Motion for Summary Judgment on their Title VII claims before the Honorable David K. Winder, United States District Judge, on May 17, 1985. The plaintiffs were represented by their counsel, Elizabeth T. Dunning, David B. Watkiss, and John E. Harvey. The defendants were represented by their counsel, Wilford W. Kirton, Jr., and Richard R. Boyle of Kirton, McConkie and Bushnell.

The Court, having reviewed plaintiffs' motion for summary judgment, together with exhibits and affidavits submitted in support, and defendants' opposition together with affidavits submitted and having heard the arguments of counsel, rendered its Memorandum Decision and Order on September 18, 1985.

On December 13, 1985, the parties stipulated to the amount of backpay [sic] and fringe benefits that would be owed to plaintiff Mayson through December 31, 1985. This Stipulation was embodied in an Order of this Court dated December 18, 1985.

On January 13, 1986, this matter came on for hearing pursuant to notice on plaintiff Arthur Frank Mayson's Motion for Entry of Final Judgment pursuant to Fed. R. Civ. P. 54(b). The plaintiffs were represented by Elizabeth T. Dunning, David B. Watkiss and John E. Harvey. Defendants were represented by Wilford W. Kirton, Jr., and Richard R. Boyle of Kirton, McConkie & Bushnell.

On January 22, 1986, the Court entered its Order and Final Judgment pursuant to Fed. R. Civ. P. 54(b) with respect to the claims of plaintiff Mayson.

On January 28, 1986, defendants filed their Motion for Rehearing and/or New Trial Pursuant to Rule 59 and for Certification Pursuant to 28 U.S.C. § 2403, wherein defendants requested that the Court vacate its January 22, 1986

Order and Final Judgment to permit certification to and intervention by the United States of America and the State of Utah. On February 4, 1986, the Court granted defendants' Motion to Vacate its January 22, 1986 Order and Final Judgment pending certification to the Attorneys General of the United States and the State of Utah pursuant to 28 U.S.C. § 2403 that the constitutionality of Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, as amended, and Utah Code Ann. § 34-35-2(5), had been drawn into question. On February 5, 1986, the Court invited the Attorneys General of the United States and the State of Utah to move for intervention within thirty days. By letter dated March 5, 1986, the Attorney General of the State of Utah informed the Court that the State of Utah did not wish to intervene. On March 7, 1986, the United States of America intervened in this action.

Pursuant to a Stipulation, Motion and Order filed March 13, 1986 and entered by the Court on March 19, 1986, Intervenor, the United States, filed its Memorandum in Support of the Constitutionality of 42 U.S.C. 2000e-1 on April 18, 1986, and plaintiffs filed their responsive Memorandum on May 9, 1986.

The matter came on for hearing before the Court pursuant to Stipulation on May 15, 1986 on the issues raised by Intervenor, the United States. The plaintiffs were represented by their counsel, Elizabeth T. Dunning, David B. Watkiss and Louise T. Knauer. The defendants were represented by their counsel, Wilford W. Kirton, Jr., Richard R. Boyle, M. Karlynn Hinman and David P. Farnsworth of Kirton, McConkie & Bushnell. Intervenor, the United States, was represented by William R. Yeomans of the Civil Rights Division of the Department of Justice and Gregory C. Diamond, Assistant United States Attorney for the District of Utah.

The Court, having reviewed Intervenor's Memorandum

and plaintiffs' response thereto and having heard the argument of counsel, reaffirms and re-enters its Order and Final Judgment of January 22, 1986, and

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff Mayson is granted backpay with interest and fringe benefits as set forth in this Court's Order dated December 18, 1985.

2. Plaintiff Mayson is ordered to be reinstated to his former position at Deseret Gymnasium.

3. Plaintiff Mayson's state law claims are dismissed with prejudice.

IT IS FURTHER DETERMINED AND DIRECTED that, there being no just reason for delay, the Judgment contained herein be entered as a Final Judgment pursuant to Fed. R. Civ. P. 54(b) on the grounds that:

(a) The Court has finally resolved all claims of plaintiff Arthur Frank Mayson.

(b) The claims of plaintiff Mayson are separable from the claims of the other plaintiffs.

(c) It would work a hardship and injustice on plaintiff Mayson to require him to await the final resolution of the claims of the other plaintiffs who were employed at Beehive Clothing Mills ("the Beehive plaintiffs").

(d) Resolution of the claims of the Beehive plaintiffs is not imminent.

(e) On balance, consideration for sound judicial ad-

ministration and economy counsels for immediate apellate review of plaintiff Mayson's claims.

DATED this 16th day of May, 1986.*

BY THE COURT:

/s/ David K. Winder
DAVID K. WINDER
United States District Judge

*Signed after being advised on 5-16-86 by Mr. David B. Watkiss telephonically that all counsel approved as to form subject to minor alterations I have made in my hand.

/s/DKW

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CIV. NO. C-83-0492W

CHRISTINE J. AMOS, JUDY BAWDEN, DENIECE KANON, APRIL JOYCE RIDING, AND ARTHUR FRANK MAYSON, RUTH ARRIOLA, SHELLEEN ADAMSON AND RALPH L. WHITAKER ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
PLAINTIFFS,

v.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, AND THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
DEFENDANTS.

SEPT. 18, 1985.

Elizabeth T. Dunning, David B. Watkiss, Molly B. Kenny, [John E. Harvey], Salt Lake City, Utah, for plaintiffs.

[Wilford W. Kirton, Jr.,] Dan S. Bushnell, [Richard R. Boyle,] M. Karlynn Hinman, David P. Farnsworth, Salt Lake City, Utah, for defendants.

MEMORANDUM DECISION AND ORDER

WINDER, District Judge.

The plaintiffs' motion for summary judgment and reconsideration and defendants' motion to strike were argued orally on May 17, 1985. The plaintiffs were represented by Elizabeth T. Dunning, David B. Watkiss and John E. Harvey. The defendants were represented by Wilford W. Kirton and Richard Boyle. Prior to the hearing, the court read carefully all memoranda of counsel. After the hearing, the court took the matter under advisement and has since reviewed the memoranda and depositions and has read all relevant authorities. Based on those materials and oral argument, the court renders the following decision and order.

I. *Background*

A. History of This Case

The court is governed by its previous decision in this case, *Amos v. Corporation of Presiding Bishop,* 594 F.Supp. 791 (D.Utah 1984) (hereinafter referred to as "Amos I"). At that time the court ruled on defendants' motion to dismiss or in the alternative for summary judgment. That action was initiated when plaintiffs brought suit claiming violations of federal and state antidiscrimination laws. They claimed their termination from employment was based on their inability or refusal to satisfy worthiness requirements of the Mormon Church for temple recommends. Contending they were employees performing nonreligious activities, they challenged the constitutionality of federal and state exemptions from antidiscrimination laws, 42 U.S.C. § 2000e-1 and Utah Code Ann. § 34-35-2(5), respectively. In addition, plaintiffs claimed the defendants wrongfully and intentionally inflicted extreme mental and emotional injury and distress on the plaintiffs by requiring them to be interviewed by church leaders concerning their

eligibility for temple recommends.

In Amos I, the court set forth an analytical framework for determining whether an activity is religious in religious discrimination suits. That framework consists of a three prong test. Because that test must be applied to defendants' activities in the present motions, the court reiterates it in full here.

> First, the court must look at the tie between the religious organization and the activity at issue with regard to areas such as financial affairs, day-to-day operations and management. Second, whether or not there is a close and substantial tie between the two, the court next must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial connection between the activity in question and the religious organization's religious tenets or matters of church administration and the tie under the first part of the test is close, the court does not need to proceed any further and may declare the activity religious.... However, where the tie between the religious entity and activity in question is either close or remote under the first prong of the test and the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or nonexistent, the court must engage in a third inquiry. It must consider the relationship between the nature of the job the employee is performing and the religious tenets of the religious organization or matters of church administration. If there is substantial relationship between the employee's job and the church ad-

> ministration or the religious organization's rituals or tenets, the court must find that the activity in question is religious. If the relationship is not substantial, the activity is not religious.

594 F.Supp. at 799.

The court in Amos I applied that test to the activities of Deseret Gymnasium ("Deseret") and more specifically, to plaintiff Mayson's position there as a building engineer. The court concluded that the nature of Deseret's activities could not be considered to be religious. 594 F.Supp. at 802. Because the court concluded that Deseret's activities were not religious, the court considered the constitutionality of the exemption from Title VII, contained in Section 702, for employees performing secular, non-religious jobs. After a thorough review of the legislative history of that law and the Supreme Court pronouncements on the Religion Clauses of the first amendment, this court held that exemption to be unconstitutional. It found that "the direct and immediate effect of the exemption of religious organizations from Title VII for religious discrimination in secular, non-religious activities is to advance religion in violation of the establishment clause of the first amendment to the United States Constitution." 594 F.Supp. at 828.

The court in Amos I also considered whether Beehive Clothing Mills ("Beehive") and the jobs of the plaintiffs Amos, Bawden, Kanon and Riding[1] who were employed there, were religious in nature. The court determined that the issue could not be decided on the record that existed at that time. It therefore delayed ruling on Beehive until further discovery could be made.[2] 594 F.Supp. at 803. The

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[1]Adamson and Arriola who were also employees at Beehive were added as plaintiffs by stipulation of the parties on October 24, 1983.

[2]The court stated that plaintiffs were entitled to conduct discovery in the following areas:

(1) the manufacturing of garments prior to 1960 and any

(footnote cont. on p. 92-a)

court also dismissed plaintiffs' cause of action for intentional infliction of emotional distress. The court determined that defendants' conduct regarding the worthiness requirements and subsequent firing did not rise to the level of "outrageous and intolerable conduct" required under Utah law. 594 F.Supp. at 831.

After the court's decision in Amos I, the parties stipulated that plaintiffs could file a Second Amended complaint adding Ralph L. Whitaker as a named plaintiff. Mr. Whitaker, a former employee of another of the defendants' divisions, Deseret Industries, was employed as a truck driver by Industries from October 1977 until March 1983, when he was fired for failure to satisfy the worthiness requirement.

B. Current Motions

At issue in plaintiffs' motion for summary judgment is the application of the three-prong test to the activity of Beehive Clothing Mills, and to the activity of Deseret Industries. If the court determines that summary judgment is appropriate, it must determine whether the facts demonstrate that the activities at issue are religious in nature. The question of whether defendants violated Title VII when they terminated the plaintiffs from their employment will follow, of course, from the determination of the secular or religious nature of the activities.

The court must also determine the appropriate remedy

(footnote cont. from p. 91-a)

subsequent changes; (2) the distribution of garments prior to 1960 and any subsequent changes; (3) the tax exempt status of Beehive; (4) the past and current employees who were or are non-members of the Mormon Church; (5) Beehive's contracts, both past and current, with private commercial enterprises for the production of garments; and (6) current hiring practices of the defendants' garment and temple clothing manufacturing plants in Mexico and England. 594 F.Supp. at 803.

for the unlawful employment discrimination of plaintiff Mayson as well as for other plaintiffs if it determines that other unlawful employment discrimination has occurred. Plaintiffs contend that they are entitled under Title VII to back pay.

Finally, plaintiffs move for reconsideration of the dismissal of their fourth claim for relief. That claim asserted a cause of action for intentional infliction of emotional distress and for invasion of privacy. Plaintiffs also move for attorney's fees and costs as the prevailing parties under 42 U.S.C. § 2000e-5(k).

II. *Motion for Summary Judgment*

A. Beehive — Application of three-prong test

The court must ascertain whether any genuine issues of material fact exist which would make the rendering of summary judgment inappropriate. The defendants have opposed the motion for summary judgment on the grounds that factual disputes remain. Each party has listed its statement of facts pursuant to U.S.Dist.Ct., D.Utah Civ.R. 5(e). Defendants have identified a number of facts which they believe remain in dispute.

The court has considered carefully both parties' statements of facts and the despositions, affidavits and answers to interrogatories. From this review, the court concludes that several genuine issues of material fact remain which preclude summary judgment as to Beehive. Pursuant to Fed.R.Civ.P. 56(d), however, the court has sifted the issues and has determined which material facts remain at issue for trial. The court has determined that many of those claimed to be in dispute by the defendants are not material to the issue at hand or are disputed by the defendants because the defendants seek to state legal conclusions as facts. In large measure, however, there is substanstantial agreement among the parties regarding many of the factual issues. The court therefore will state those facts which it has

found established[3] as well as specify those narrow areas of factual dispute which remain for trial.[4]

Factual Background

The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints ("The CPB") and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints ("the COP") are corporations soles [sic] organized pursuant to the laws of Utah, Utah Code Ann. § 16-7-1 to 11 (1973). The COP is the incorporation of the office of the President of the Church of Jesus Christ of Latter-day Saints ("the Mormon Church" or "the Church")[5] and the CPB is the incorporation of the office of the Presiding Bishop of the Mormon Church.[6] Beehive Clothing Mills ("Beehive") and Deseret Industries ("Industries") are unincorporated divisions of the Corporations.

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[3]The court will recite those facts which are crucial to the issue at hand. The parties have agreed on additional facts which are not stated herein.

[4]The court cites the source of particular factual findings only when the facts have been asserted as disputed or when the facts have been unclear. Although the court has not engaged in "fact finding" it has considered the general proposition that a deposition is more reliable than an affidavit. *See* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.11(4) (2d ed. 1985).

[5]The ecclesiastical leader of the Mormon Church is its President, who is recognized by Mormon members as a prophet, seer and revelator chosen by Jesus Christ. The President and his counselors constitute the First Presidency of the Mormon Church.

[6]The First Presidency is assisted in administering the affairs of the Mormon Church by priesthood quorums and counsels which include the Presiding Bishopric. The Members of the First Presidency, Presiding Bishopric and the quorums constitute what the Mormon Church refers to as its "General Authorities". The General Authorities make all ecclesiastical, administrative and policy decisions in the Church.

Plaintiff Christine J. Amos ("Amos") was employed in the personnel department of Beehive from April 26, 1976 through August 25, 1982. 594 F.Supp. at 796. Judy L. Bawden ("Bawden") worked as a seamstress at Beehive from 1971 to April 28, 1982. *Id.* Deniece Kanon ("Kanon") was employed as a seamstress at Beehive from 1978 to May 14, 1982. *Id.* April Joyce Riding ("Riding") worked as a steamstress at Beehive from 1974 to May 28, 1982. *Id.* Plaintiff Ruth Arriola ("Arriola") was employed at Beehive from 1980 through September 22, 1982. Shelleen Adamson was employed at Beehive from 1980 through September 22, 1982.

The Mormon Church is a religious association with headquarters in Salt Lake City, Utah and with members in various parts of the world. Although the Church conducts a variety of activities as well as worship services in chapels and meeting-houses, certain ceremonies and activities are reserved for the Church's temples. The temples are used for worship, prayer, instruction, ordinances and ceremonies such as baptisms and marriages. Temples are open to only those members of the Church who have met the worthiness requirements and have been granted a temple recommend after a series of interviews with Church leaders.[7]

Among the beliefs of the Mormon Church is that a member must make covenants with God during the temple ordinances. Temple garments and temple clothing must be worn when those covenants are made.[8] Members of the Mormon Church are required to wear the garments

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[7]Members are asked a variety of questions to determine if they live according to Mormon Church standards and support the Church's leadership.

[8]Temple garments are a white undergarment which covers the body from the knee to the neck. Temple clothing consists of special ceremonial robes and head coverings worn during specific portions of the Temple ceremony.

throughout their lives once they have participated in the ceremonies and covenants. The garments are marked with symbols whose significance is known to those who have participated in temple ceremonies. The Church regards the marks on garments as perhaps their most sacred feature. Supp.Ans. 14. Garments are considered to be more sacred after they are marked. *Id.*

Beehive Clothing Mills manufactures temple clothing, garments and temple veils. Determining whether Beehive's activities are religious is, of course, the crux of the issue at hand.

In 1936, the Mormon Church set up an operation to manufacture garments called Deseret Clothing Factory. From 1938 to 1960, four commercial companies,[9] not owned by or affiliated with the Mormon Church, also manufactured garments in the United States under restrictive licenses from the Church. These licenses forbade sale to non-members, display, or advertising of the garment.

The four commercial companies performed all necessary steps in the manufacture of the garments prior to their being marked with the religious symbols. Marking was authorized to be done by the Mormon Church member who purchased the garment, by the Relief Society of the Church or by Church members assigned to be at the commercial companies to mark the garments. No religious requirement of any kind was imposed on any employee of the four commercial companies. Until 1965, garments were distributed through the Mormon Church and also through certain department stores under restrictive licenses which forbade

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[9]The companies were Lady Gay Manufacturing, Salt Lake Knitting Works, Ogden Knitting Works and Security Knitting Works. In addition to garments, Lady Gay Manufacturing manufactured other types of clothing of no religious significance for other customers. The other three commercial companies manufactured only garments.

sale to non-members and prohibited display or advertising of garments.

When Beehive took over the manufacturing operations of the commercial companies in 1960, it continued to employ a number of the companies' employees. Among them were some who were not eligible for a temple recommend, ("ineligible members") and some who were not members of the Mormon Church. Supplemental Answers to Plaintiffs' Third Set of Interrogatories and Second Request for Production of Documents, December 14, 1984 ("Supp.Ans.") No. 8. At least some of the non-members or ineligible member employees were retained by agreement under and arrangement with the companies. Deposition of Harold Goldthorpe, January 18, 1985 ("Goldthorpe Depo.") at 190. From 1960 until at least 1983, Beehive has employed a few non-members and some members ineligible to receive a temple recommend. Affidavit of John Russell Homer, April 12, 1985, ("Homer Affidavit") Paragraph 5. Non-Mormon employees and members of the Church who were ineligible for a temple recommend have performed a variety of tasks at Beehive, including cutting, sewing and marking garments, packing and shipping garments and temple clothing. Supp.Ans. Exhibit ("Ex.") 15, Goldthorpe Depo. at 82-92. Supp.Ans. No. 27 & Ex. 18.

In 1980 and 1981, Beehive contracted on a job lot basis with a number of commercial companies in Utah and Arizona as it could not meet the immediate demand for garments created when a new design of garment was introduced. Supp.Ans. No. 24; Goldthorpe Depo. at 71. Under its arrangement with these commercial manufacturers, cutting, marking, packaging, and distribution were done at Beehive. The commercial companies did the sewing of the pre-cut pieces. No religous requirement of any kind was imposed on any of these commercial companies' employees.

At present, three commercial companies outside of the United States, not owned by or affiliated with the Mormon Church, also produce garments. They are Jockey, Inc., in the Phillipines, I-Way Manufacturing in the United Kingdom and Canterbury Manufacturing in New Zealand. I-Way Manufacturing has been producing garments since 1979, Jockey, Inc. has been producing garments since 1984, and Canterbury Manufacturing has been engaged since approximately 1982. Supp.Ans. No. 24; Affidavit of Keith B. McMullin, April 11, 1985 ("McMullin Affidavit") paragraph 15. In each case, the commercial company cuts, and sews the garment up to the marking stage. Marking, packaging, and distribution are done by the Mormon Church. Supp.Ans. No. 24. No religious requirement of any kind is imposed upon the employees of these foreign companies who cut and sew garments. Recently, the Mormon Church has contracted with companies in Taiwan and Korea to manufacture garments. McMullin Affidavit, paragraph 14.

Beehive is an unincorporated division of the Materials Management Department of the Mormon Church. Its daily operations are supervised by a general manager who reports to the managing director of the Materials Management Department. Beehive operates under the direction of a special Church committee composed of General Authorities,[10] department and division management representatives and other Church leaders. Employees of Beehive are paid by the Mormon Church through the COP. Beehive's facilities are owned by the Mormon Church through the CPB.

Beehive's banking and accounting are handled through the Mormon Church. Beehive sells the garments and temple clothing it manufactures to members at no profit. The

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[10] *See supra,* note 3.

religious veils made at Beehive are used exclusively in temples and are not sold. Beehive's general operations are regularly subsidized by the Mormon Church from its general funds. Beehive's operation and facilities are tax exempt. The general authorities of the Mormon Church must approve changes in the way garments and temple clothing are manufactured and must approve who manufactures the garments.

Amos worked as an employee service aide, a personnel asssistant, for Beehive from August 30, 1979 to August 25, 1982. As part of her duties, she interviewed job applicants and oriented new hires to the terms of employment at Beehive. She also processed insurance, retirement, tax and payroll forms. She did not make hiring or firing decisions.

In August 1979, when Amos was being trained, she was told by the Personnel Manager of Beehive that job applicants did not have to be active in the Mormon Church to be hired. Amos was instructed only to ask if an applicant was a baptized member of the Mormon Church and if he or she observed certain dietary and health laws of the Mormon Church, called the Word of Wisdom.

The employment policy of Beehive at the present time is administered by the Personnel Department of the Mormon Church. Prior to 1981, however, the Church's Personnel Department did not fully supervise the employment policies of Beehive. Homer Affidavit, paragraphs 3 and 4, Affidavit of Christine Amos, March 16, 1985, ("Amos Affidavit") paragraph 5. Prior to December 1981, the employment application at Beehive asked whether the applicant kept the standards of the Mormon Church. At least one applicant was hired who answered no to that question. Amos Affidavit, paragraph 5. Homer Affidavit, paragraphs 8 and 10. After December 1981, the employment application form contained a pledge to be signed by the applicant to live so as to be eligible to hold a temple recommend. Homer Affidavit, paragraph 8.

The Mormon Church adopted personnel policies and procedures in 1969 which stated that "continued employment in the Church is dependent on the employees living their lives so as to be worthy of a temple recommend." These policies were not strictly applied to Beehive until it came within the full adminstration of the Personnel Department after 1980. Homer Affidavit, paragraphs 3 and 4. Plaintiffs Amos, Kanon, and Riding[11] were given copies of Beehive's personnel manual during their employment. Each signed a statement indicating that she had read it. In the manual is included the following statement:

> As Latter-day Saints we have certain standards that the First Presidency has asked us to abide by. All employees are expected to conform to the teachings of the Church of Jesus Christ of Latter-day Saints. Serious violations of these teachings will result in an employee being terminated.

Pursuant to directions from the Personnel Department, a review of various Church departments and division employees was begun in 1980 to determine compliance with Church personnel policy. Homer Affidavit, paragraph 6. A formal review to determine whether all employees at Beehive were worthy of a temple recommend was conducted in the Spring of 1982. Goldthorpe Depo. at 33. Homer Affidavit, paragraph 7. No such similar formal review had occurred in the preceeding ten years. Goldthorpe Depo. at 7, 33. The review was announced at a regularly scheduled Monday morning devotional meeting.[12]

During the 1982 review of the 399 employees at Beehive, plaintiffs Amos, Bawden, Kanon, Riding, Arriola and

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[11]Whether plaintiff Arriola received a copy of the manual is disputed.

[12]Devotional services are held weekly at Beehive and all employees are encouraged to attend.

Adamson and 78 other employees were identified as employees who were not worthy of a temple recommend. Plaintiffs and thirteen other employees were terminated after refusing to complete or failing to complete satisfactorily a probationary period to become eligible members. Sixty-eight other employees who were found ineligible became eligible during their probationary period. Two employees who were former employees of the commercial companies were retained although they were not members.

Plaintiffs Bawden, Kanon, and Riding were employed as seamstresses. Plaintiff Arriola was employeed as a cutter of temple clothing at the time of her termination. Adamson was employed as a cutter of garments. Amos was employed as an employee service aid. At no time did any of the plaintiff's [sic] positions of employment require any of them to describe, explain or proselytize the doctrine and beliefs of the Mormon Church. At no time did any of plaintiff's [sic] positions require any of them to engage in worship, ritual or ministerial duties of the Mormon Church nor in matters of Mormon Church administration.

Factual Issues in Dispute or in Need of Development

Both parties agree that step one of the three-prong test is not at issue here. Plaintiffs concede that the tie between Beehive and the Mormon Church in such areas as financial affairs, day-to-day operations and management is close and substantial.

Several factual issues remain to be clarified before the court can proceed to apply the three-prong test. Both parties agree that the jobs performed by the plaintiffs at Beehive do not in and of themselves involve worship, ritual or ministerial duties of the Mormon Church. Plaintiffs argue that because the individual jobs such as cutting or sewing the garments are not religious and because the Mormon Church has relied and currently relies on non-Mormon owned companies to manufacture garments, Beehive can

not be considered a religious activity. Plaintiffs believe the facts indicate that there is no sincerely held religious belief or tenet that only members of the Mormon Church or those members who are eligible for a temple recommend can be employed manufacturing garments.

The defendants, however, insist that the facts indicate that they are moving toward direct production of all garments by Mormon Church-owned manufacturing facilities. They assert that Church control of the entire manufacturing process is necessary in order to shield the Church's sacred objects from ridicule by non-Mormons. They state that only eligible members are currently employed at Beehive. Past practices of allowing non-members or ineligible members to be employed were necessitated by the Church's agreements with the companies they took over or by necessity when a sudden demand for new styled garments temporarily overwhelmed Beehive's capabilities.

Defendants also contend that the manner of supplying garments to Church members outside of the United States is not relevant to the issue at hand. They state that even if foreign garment operations are pertinent, requirements that workers abroad be temple worthy and that companies be owned and controlled by the Mormon Church is not feasible. Defendants cite four major reasons for not imposing Church membership requirements similar to those imposed on United States employees on those who manufacture garments abroad. They are: (1) government restrictions preclude import; (2) local laws do not recognize religious preference; (3) volumes do not justify the high costs of the creation of Church facilities and; [sic] (4) there are insufficient numbers of skilled Church members capable of being employed. McMullin Affidavit, paragraph 13.

In summary, defendants assert that Beehive and the plaintiffs' jobs are religious activities because garments and

temple clothing are an essential element of temple worship. The manufacturing of garments and temple clothing is a "religious necessity and its achievement can only be held to be a religious activity." Defendants' Memorandum in Opposition to Motion for Summary Judgment at 69.

Plaintiffs contest not only defendants' conclusion but also the consistency of defendants' asserted belief that only eligible members can manufacture temple wear. They dispute that there are laws which do not recognize religious preference in employment in any countries where garments are being manufactured by commercial firms. They point to the testimony of Harold Goldthorpe, manager of the International Materials Management division of the Mormon Church, which they believe suggests that there are no such laws. *See* Goldthorpe Depo. at 109-110, 113. Plaintiffs also assert that Beehive's history of employing ineligible and non-member employees until 1983 indicates that the manufacturing of garments is not a religious activity. Plaintiffs note, for example, that between 1973 and 1983, the Mormon Church produced garments at its own facility in England. Goldthorpe Depo. at 54-56. It now contracts with a non-Mormon commercial company in England, I-Way Manufacturing, to manufacture garments.

The court believes two narrow but significant factual areas remain in dispute or are unclear in the record. Evidence needs to be presented in court to resolve them before summary judgment is appropriate. The first area involves Beehive's hiring practices regarding applicants who answered "no" to the question of whether they kept the standards of the Church. The plaintiffs claim that several applicants were hired who answered "no." The defendants assert that only one was hired. Evidence should be presented regarding the numbers of such individuals hired and the circumstances, if any, prompting the hiring of non-members or ineligible members.

The second area of factual dispute that necessitates a hearing involves the defendants' contention that circumstances exist that preclude the manufacture abroad of garments and clothing by Mormon owned companies or eligible Mormon Church members. The defendants have asserted in the affidavit of McMullin that certain factors abroad hinder or prevent the imposition of religiously based employment practices in other countries.

The following facts need to be determined regarding the manufacture of temple garments and clothing for each foreign situation:

1. What specific laws are in existence that relate to the issue of religious preference in hiring? How do they impact the manufacture of garments?

2. What are the specific laws or regulations that preclude import of garments?

3. What is the volume of garments manufactured in the country? What is the cost per garment or unit and how does that impact upon the manufacture of garments?

4. What are other critical factors associated with the manufacture of garments that result in their manufacture by commercial companies rather than by a Mormon-owned facility or individual Mormon seamstresses?

Despite the defendants' contention that the facts surrounding the foreign manufacture of garments is [sic] not critical to the resolution of American constitutional rights, the court believes otherwise. The Mormon Church asserts that the manufacture of garments and temple clothing is a religious activity. If it believes that the manufacture of garments should be done by Mormons if at all possible, then the manufacture of garments throughout the world should be reflective of that belief. Practices resting "solely

upon considerations of policy, pragmatism, or expediency", *Welsh v. United States,* 398 U.S. 333, 342-43, 90 S.Ct. 1792, 1797-98, 26 L.Ed.2d 308 (1970) (plurality opinion of Black, J.) will not support a finding that they are religiously motivated.

B. Deseret Industries

Although defendants have not made a motion for summary judgment in their favor, the court can find no genuine issue of material fact regarding Deseret Industries. Each parties' statement of facts pursuant to U.S.Dist.Ct., D.Utah Civ.R 5(e) is similar. Defendants have listed additional facts regarding the relationship between Deseret Industries and the Mormon Church which the plaintiffs have not disputed.

The court has considered carefully both parties' statements of facts as well as the depositions, answers to interrogatories and affidavits and concludes that summary judgment is appropriate under the standards of Fed.Rule Civ.P. 56. No genuine issues of material fact exist and the court can rule as a matter of law.

Although defendants have not filed a cross-motion for summary judgment, the court nontheless grants summary judgment in their favor. This is appropriate where there is no genuine issue of material fact and, on the established facts, the principles of substantive law warrant judgment in their favor. *See* 6 (Part 2) James Moore and Jeremy Wicker, *Moore's Federal Practice* ¶ 56.15(8).

Factual Background

Deseret Industries ("Industries") is a division of the Mormon Church's Welfare Services Department. Deseret Industries operates a number of thrift stores throughout Utah which sell used clothing and refurbished goods to the general public. In doing so, Industries provides employ-

ment and training to handicapped and mentally retarded persons through a federally certified sheltered workshop program. Deseret Industries also provides jobs for people who are unable to find other remunerative work.

These handicapped and previously unemployed employees are employed on the basis of a referral from a Mormon bishop and are therefore categorized by Deseret Industries as "client referrals." The client referrals refurbish donated goods as well as perform tasks related to the contracting work which Deseret Industries undertakes from time to time for outside companies, such as sorting or performing routine assembly tasks.

Deseret Industries also employes [sic] "staff" employees. While staff employees are frequently managers, supervisors, or trainers, staff employees may perform tasks with less supervisory responsibilities. Some positions, such as that of a repairman, for example, may be occupied by either a staff or a client referral employees [sic].

All of the staff employees of Deseret Industries are required to be eligible Church members. A very high percentage of the client referral employees are also Mormon Church members. A client referral becomes employed when the individual's bishop[13] refers that person to Industries to see if training or employment can be made available. Non-Church member referrals are occasionally made when that referral is a part of the assistance given to the non-member's family who are Church members.

Deseret Industries solicits used goods and customers from the general public through public advertisements. In addition to revenues generated by the sale of refurbished

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[13]A bishop is the church or "priesthood" leader with responsibilities over the local "ward" of the Mormon Church. A bishop is chosen or approved in his position by the General Authorities of the Church.

goods and contracted services, Deseret Industries is regularly subsidized by the Mormon Church and by fast offerings[14] contributed by Church members. Industries' operations are exempt from federal and state taxes. Bishops of the Mormon Church have authority to requisition from Deseret Industries items necessary to meet the needs of needy members of the Mormon Church at no cost to the recipient. All employees at Deseret Industries are encouraged to attend one of several Mormon devotional services held daily at each facility.

Plaintiff Whitaker was employed as a truck driver at a Deseret Industries store in October, 1977, pursuant to a referral from his Mormon bishop. In November, 1977, he was excommunicated from the Mormon Church; a fact of which the manager of Deseret Industries store was aware. Whitaker was considered to be a good worker, however, and was retained as a truck driver. He also supervised a handicapped trainee. Sometime [sic] between 1982 and 1983, the status of Whitaker's position was changed from a referral to a staff position. In early 1983, Whitaker was informed that because he could not be worthy of a temple recommend, he would be terminated and he was accordingly fired on March 15, 1983.

Whitaker's job as a truck driver did not require him to describe, explain or proselytize the doctrines and beliefs of the Mormon Church nor to engage in worship or ritual. Except for his responsibilities as the trainer of a handicapped individual, his job did not involve other supervisory responsibilities.

When Whitaker was referred to Deseret Industries in 1977, he completed and signed an employment application

[14]Mormon doctrine requires each faithful member to fast for a period of time each month and contribute the savings to the Mormon Church. The Church uses the funds to assist the needy through a variety of programs including Deseret Industries.

which included a paragraph stating that he would adhere to Mormon Church standards.

Discussion

It is clear from the facts that religion was the key factor in Whitaker's discharge. The task before the court is to determine whether Deseret Industries' activities are religious in nature. If they are, Deseret Industries is permitted to discriminate on the basis of religion both under the free exercise clause of the First Amendment and pursuant to the exemption provided by section 702 of Title VII. If Deseret Industries' activities are secular, however, it can not rely on the exemption provided under section 702 because of this court's decision in Amos I.

The legal standards for examining whether Deseret Industries' activities are religious have been set forth in Amos I in the three-prong test. 594 F.Supp. at 799. That test has been stated in full above. Both parties agree that step one of the test is not at issue in the present case. The tie between Deseret Industries and the Mormon Church with regard to areas such as financial affairs, day-to-day operations and management is a close and substantial one. Deseret Industries was established by the Mormon Church and is a part of the Mormon Welfare Services Department. Deseret Industries' operations and facilities are subsidized by the fast offerings of the Church members and by general Church funds. Deseret Industries is managed by a general manager who in turn reports to a governing board. That governing board is composed of General Authorities, members of the General Boards of Church ladies' and men's auxiliary organizations and other priesthood leaders.

The dispute between the parties is focused on the second step of the test outlined in Amos I. That prong requires the court to "examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matter of Church ad-

ministration." 594 F.Supp. at 799. The court concludes that the nexus between the primary function of Deseret Industries and the religious tenets of the Mormon Church is close and substantial. Accordingly, Deseret Industries is a religious activity and the Mormon Church may determine religious qualifications for Deseret Industries' employees.

In Amos I, this court rejected the plaintiffs' contention that the court should focus only on the type of jobs that the plaintiffs were performing and not on the general nature of the entities involved. 594 F.Supp. at 798. Instead, the court developed a more comprehensive approach. The three-prong test includes an analysis of the general nature of the activity in relation to the religious tenets of the organization, its relationship administratively to the religious organization and an analysis of the individual job in question. Prong two which examines the primary function of the activity in relationship to the religious beliefs of the religious organization, requires a much broader view of the activity in question than simply an examination of the individual's job. An examination of the function of an activity necessarily implies a consideration of the activity's purpose that it serves or the particular kind of work it is intended to perform. *See Webster's New Collegiate Dictionary,* (1979). That definite end or purpose must be measured against the religious rituals or tenets of the organization or against matters of Church administration. There must be a substantial connection between the two to satisfy the second prong.

The present-day Welfare System of the Mormon Church of which Deseret Industries is a part, was established in 1936. At that time, the president of the Church stated the primary purpose of the welfare plan was:

> to set up, in so far as it might be possible, a system under which the curse of idleness would be done away with, the evils of a dole abolished, and independence, industry, thrift and self respect be

> once more established among our people. The aim of the Church is to help the people to help themselves. Work is to be reenthroned as the ruling principle of the lives of our Church membership.

Heber J. Grant, Conference Report, October 1936, p. 3, *quoted in Welfare Services Resource Handbook.*

The founder and prophet of the Mormon Church, Joseph Smith, stressed the importance of welfare work in Mormon beliefs. He stated:

> You must continue to bear in mind that the temporal and the spiritual are blended. They are not separate. One cannot be carried on without the other, so long as we are here in mortality.
>
> The Latter-day Saints believe not only in the gospel of spiritual salvation.... We do not feel that it is possible for men to be really good and faithful Christian people unless they can also be good, faithful, honest and industrious people. Therefore, we preach the gospel of industry, the gospel of economy, the gospel of sobriety.

Gospel Doctrine, Deseret Book Company, p. 208, (*quoted in Welfare Services Resource Handbook,* p. 4.)

Various passages of Mormon scripture also indicate the importance the religion places on charity and work. *The Book of Mormon*, Moroni 7:47 states that "charity is the pure love of Christ, and it endureth forever; and whoso is found possessed of it at the last day, it shall be well with him." The *Doctrine and Covenants* (Section 52:40) requires that the Mormon Church and its members "remember in all things the poor and the needy, the sick and the afflicted, for he that doeth not these things, the same is not my disciple."

The Welfare System of the Mormon Church is multifaceted. The Church operates a system of bishops'

storehouses to provide commodities and work opportunities at the local level. Local wards and stakes are encouraged to undertake and develop projects which will produce goods for the welfare system including goods for the bishops' storehouses. These projects can take the form of working farms and manufacturing plants. The Church also operates employment centers and social welfare services for use by Church members. As part of its teachings on self-sufficiency, the Mormon Church urges members to store a year's supply of food, clothing and fuel. *See Welfare Services Resource Handbook.*

The *Welfare Services Resource Handbook ("Handbook")* produced for local Church leaders states that "the ultimate aim of welfare services' principles, programs, and activities is to develop Christlike character in Church members, thus preparing them to live in a society where men and women are of 'one heart and one mind,' where they live in 'righteousness' and there are 'no poor among them'." *Handbook* at 1. The 1985 Priesthood Manual distributed to all men in the Mormon Church states: "As we willingly accept welfare assignments and give a generous fast offering, we play a vital part in the Lord's work. As we offer both our time and our means, we develop "the pure love of Christ" (Moroni 7:47) and thus qualify to "become the sons of God" (Moroni 7:48). *See* Affidavit of Glen Pace, April 12, 1985, paragraphs 3 and 4.

Deseret Industries is a part of the Mormon Church's welfare services program. The specific objectives of Deseret Industries are set forth in the *Handbook*. The objectives are to:

> (1) provide meaningful employment and work training within the storehouse resource system, insofar as it is possible, for those who cannot otherwise obtain employment. This includes rehabilitating some needy members by providing

work and training in an environment which will enable them to become self-sustaining;
(2) produce quality items for use by bishops, and low cost items for sale to the public;
(3) provide opportunities for individuals to share their means and talents with those who need such help;
(4) provide a means whereby goods can be recycled or renovated, thus avoiding waste.

Plaintiffs contend that these objectives of Deseret Industries indicate that it is not a religious activity. They concede that all the activities of Deseret Industries are motivated by the Mormon Church's belief in charity and rendering assistance to the needy. Plaintiffs assert, however, that religious motivation alone is not sufficient to make an activity religious.

Plaintiffs draw the court's attention to *Denver Post of the Nat'l Socy of the Volunteers of America v. N.L.R.B.*, 732 F.2d 769 (10th Cir. 1984). In that case, the court rejected a finding that the VOA's charitable operations were religious.[15] In reaching its finding, the court focused on the nature of the activities of the VOA programs. It found that although the VOA claimed its programs were an expression of its religious philosophy, it was not clear that religion played a central role in them. The court noted that the VOA did not require the staff to have any particular religious background nor were religious activities conducted at the programs' facilities. Moreover, many of the programs' employees were unaware of the VOA's religious missions. The court concluded that the VOA's programs "function in essentially a secular fashion." *Denver Post of VOA*, 732 F.2d at 772.

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[15]The VOA operated social programs in Denver which included "facilities that provided temporary shelter, care, and counseling for women and children." *Denver Post of VOA*, 732 F.2d at 770.

Plaintiffs assert that Deseret Industries also operates in a secular fashion. They note that the program solicits used goods from the public at large and that its stores are open to all. Deseret Industries advertises to the general public and its advertisements do not refer to Industries' religious nature. In addition, plaintiffs assert that its employees are not involved in proselytizing or advocating the Mormon religion.

The court, however, finds that there are significant differences between the functioning of the VOA programs in *VOA supra,* and Deseret Industries. Deseret Industries' employees are for the most part, Church members and have been since its inception. All staff and management positions are filled by Church members. All client referral employees are employed only after a Mormon Church bishop has made the referral. Non-Church members are hired only if referred by a Mormon Church bishop. Although Deseret Industries operates sheltered workshops, those who are employed there are almost exclusively Church members. Industries does not provide employment for the public at large.

The thrift shops also serve Church needs. The bishops of the Mormon Church as ecclesiastical leaders at the local neighborhood level have the ability to requisition goods at no cost from Deseret Industries for Church members in need. Deseret Industries does not similarly give away its goods to members of the general public. The fact that it offers refurbished goods to the public at low cost does not necessarily mean that the organization is functioning in a secular fashion. "A religious activity of a religious organization does not lose that special status merely because it holds some interest for persons not members of the faith, or occupies a position of respect in the secular world at large." *Feldstein v. Christian Science Monitor,* 555 F.Supp. 974, 976 (D.Mass. 1983).

All employees of Deseret Industries are aware of its relationship with the Mormon Church. Daily devotional services are held on the premises. In addition, Deseret Industries is dependent on the Mormon Church for its financial support.

Plaintiffs contend that that approach used by the Tenth Circuit in *VOA*, however, focuses solely on the nature of the activities in question and disregards religious motivation if the particular activities do not appear to be overtly religious. More particularly, plaintiffs suggest that only those activities which obviously involve the propogation [sic] of religion or the performance of religious worship can be considered to be religious. That characterization of the court's reasoning in *VOA*, however, is incomplete. It is true that with respect to the religious nature of Deseret Industries, the court must consider "the activity at issue by reference to objectively ascertainable facts concerning their nature and scope." *See Tony and Susan Alamo Foundation v. Secretary of Labor*, ____ U.S. ____ 105 S.Ct. 1953, 1960-61, 85 L.Ed.2d 278 (1985). But that does not mean that the court must ignore an inquiry into the belief system that informs the particular actions in question. Implicit in the court's analysis in *VOA* and critical to the second prong of the Amos I test is the *relationship* between the objectively identifiable activities of the organization and its religious beliefs and tenets (or matters of Church administration). That relationship must be close and substantial in order for the organization to meet the second prong of the test. Moreover, even if the relationship under prong two is close and substantial, there must also be either a close tie between the activity in question and the administrative day-to-day functionings of the religious beliefs or tenets to render the activity "religious".

Under the three-prong test of Amos I and Supreme Court pronouncements, an organization's activities need not be limited strictly to propagation or advocation of

religious beliefs to be found religious. Such a restricted view of what is "religious" would drastically curtail the scope of protection provided by the first amendment. Religious beliefs may dictate a wide range of conduct beyond simply that involved in proselytization or worship. Determining whether or not adherence to a particular philosophy constitutes a religious belief entitled to constitutional protection is "more often than not a difficult and delicate task." *Thomas v. Review Board of Indiana Employment Sec. Div.,* 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981). Whether a belief is religious does not depend on whether the belief is true or false, *United States v. Ballard,* 322 U.S. 78, 86-88, 64 S.Ct. 882, 886-87, 88 L.Ed. 1148 (1944) or whether the belief is "acceptable, logical, consistent, or comprehensible to others..." *Thomas,* 450 U.S. at 714, 101 S.Ct. at 1430. The religious nature of a belief depends on whether the belief if based on a theory "of mans [sic] nature or his place in the Universe," *Founding Church of Scientology v. United States,* 409 F.2d 1146, 1160, (D.C.Cir. 1969), *cert. denied,* 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed.2d 427 (1969), or represents "[A] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God" of orthodox believers. *United States v. Seeger,* 380 U.S. 163, 176, 85 S.Ct. 850, 859, 13 L.Ed.2d 733 (1965). A religious belief must be sincerely held. *United States v. Seeger,* 380 U.S. 185, 85 S.Ct. at 863-64; *Theriault v. Carlson,* 495 F.2d 390, 394 (5th Cir. 1974), *cert. denied,* 419 U.S. 1003, 95 S.Ct. 323, 42 L.Ed.2d 279 (1974). Religious beliefs may have their source in scripture or tradition, revelation or meditation. They may be institutionalized or "be of a recent vintage or formed instantaneously." *Brown v. Dade Christian Schools,* 556 F.2d 310, at 313 (5th Cir. 1977)[,] *cert. denied,* 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978). "Religion" must be defined broadly to secure protections guaranteed in the first amendment's free exercise clause. *See* Note, "Toward a Constitutional Definition of

Religion," 91 *Harvard L.Rev.* 105 (1978). In such an intensely personal matter, the claimant's assertion "that his belief is an essential part of a religious faith must be given great weight." *United States v. Seeger,* 380 U.S. 163, 184, 85 S.Ct. 850, 863, 13 L.Ed.2d 733 (1964).

The close ties that exist between the function of Deseret Industries and the religious tenets and beliefs of the Mormon Church are inescapable. Deseret Industries was founded by the Mormon Church. It functions to provide both meaningful employment and training to Mormon Church members as well to provide the resources for bishops to utilize when helping needy Church members. It is clear from the record that the Mormon Church believes in providing charity to its members and believes that spiritual well-being and temporal well-being go hand in hand. The *raison d'etre* of Deseret Industries is to carry out the Mormon Church's aim to help members help themselves and in so doing to fulfill the admonition of its founder, Joseph Smith, to "develop the pure love of Christ." The court finds that Deseret Industries is a religious activity as there is an intimate connection between Industries and the defendants and the Mormon Church and between the primary function of Industries and the religious tenets of the Church. The court does not need, therefore, to consider the third step of the test.

III. *Title VII Remedies — Backpay*

The only plaintiff presently entitled to a remedy under Title VII is Frank Mayson. Because of this court's decision in Amos I, it is clear that defendants unlawfully discriminated against Mayson when they terminated his employment from Deseret Gymnasium on religious grounds. Plaintiff urges that he be awarded backpay with interest from the date of his firing plus contributions to his pension and that he be reinstated to his former position.

Awarding backpay under Title VII, as provided in 42

U.S.C. § 2000e-5,[16] is not mandatory. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 415, 95 S.Ct. 2362, 2370, 45 L.Ed.2d 280 (1975). In determining whether backpay is appropriate, the district court must exercise its discretion in order to further the twin statutory goals of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle,* 422 U.S. at 421, 95 S.Ct. at 2373. *See also United States v. Lee Way Motor Freight, Inc.,* 625 F.2d 918, 931 (10th Cir. 1979). (Back pay is an "effort to make the aggrieved persons whole insofar as possible ..."). In spite of the equitable nature of the remedy, however, the Supreme Court has stressed that there is a strong presumption in favor of a backpay award. *Albemarle,* 422 U.S. at 421, 95 S.Ct. at 2373; *City of Los Angeles, Department of Water and Power v. Manhart,* 435 U.S. 702, 723, 98 S.Ct. 1370, 1383, 55 L.Ed.2d 657 (1978). The fact that an employer's breach has not been made in bad faith is an insufficient reason for denying backpay because "Title VII is not concerned with the employer's good intent" .... Rather, the thrust of Title VII is directed ""to the *consequences* of employment practices, not simply the motivation."" *Albemarle,* 422 U.S. at 422, 95 S.Ct. at 2374, quoting *Griggs v. Duke Power Co.,* 401 U.S. 424 at 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971) (emphasis in the original).

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[16]42U.S.C. § 2000e-5 states:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay....

Defendants argue that it would be unfair for the court to grant retroactive relief in this situation. They contend that they relied justifiably on the plain language of the exemption provided by section 702 when they imposed their employment standards. Defendants make the legitimate argument that legislative acts are presumed to be constitutional and no court until now directly confronted the constitutional issues posed by that exemption.[17]

Defendants rely on *City of Los Angeles v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) to support their contention that it would be unjust for this court to award backpay under these rather unique circumstances. In *Manhart*, the employer withheld more from its female employees' checks for pension contributions than from its male employees because women as a class live longer than men. Although the Court held that this practice violated Title VII, it did not uphold the awarding of backpay. It recognized that the administrators of the pension plan may well have assumed their requirements were lawful. The Court reasoned that the deterrent effect of imposing backpay would be unnecessary in that situation, while its imposition could threaten the solvency of the overall plan. The Court in *Manhart* stressed, however, that their decision "did not qualify the force of the *Albemarle* presumption" in favor of backpay. *Manhart,* 435 U.S. at 723, 98 S.Ct. at 1383.

This court has considered carefully the *Manhart* decision and finds the considerations presented there which argued against backpay are not so strongly present here.

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[17]This court's holding was foreshadowed by discussions in *King's Garden, Inc. v. F.C.C.,* 498 F.2d 51 (D.C.Cir.), *cert. denied,* 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 469 (1974) and *Feldstein v. Christian Science Monitor,* 555 F.Supp. 974, 978-79 (D.Mass., 1983). This does not mean, however, that defendants were not justified in relying on the section 702 exemption.

The court acknowledges the forcefulness of the defendants' argument and finds the decision on backpay to be a close one. Nonetheless, on careful reflection upon the objectives of Title VII, the court concludes that retroactive relief is appropriate here. It is true that the denial of backpay in this instance would probably not "frustrate the central statutory purpose of eradicating discrimination throughout the economy." *See Albemarle,* 422 U.S. at 421, 95 S.Ct. at 2373. But the denial of backpay would frustrate the Act's purpose of making Frank Mayson whole for his injuries incurred through Deseret's past discrimination. Mayson's termination from employment at Deseret resulted in a substantial pay cut and impacted negatively upon his prospective pension benefits. The thrust of the remedial actions of the court must be directed at the employment practices' consequences, not at their motivation. *Albemarle,* 422 U.S. at 422, 95 S.Ct. at 2373-74. The statutory directive to make the employee whole tips the equities in favor of the awarding of retroactive relief.[18]

Accordingly, Frank Mayson is entitled to an award of backpay representing the difference between what he has earned subsequent to his termination on April 10, 1981 through the date of this order and what he would have earned if he had not been fired. This figure must include an estimate of the annual increases that Mayson would reasonably have received as well as compensation for lost vacation time (the difference in vacation days provided by Deseret and his subsequent employers). Defendants must also contribute the appropriate annual amounts to Mayson's pension account from April 10, 1981. *U.S. v. Lee*

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[18]The court does not believe that the exemption from backpay provided by section 713 of Title VII, 42 U.S.C § 2000e-12 is applicable here. That narrow exemption pertains to an employment practice in good faith conformity with and reliance upon a written opinion of the Equal Employment Opportunity Commission.

Way Motor Freight, Inc., 625 F.2d 918 (10th Cir.1979). Mayson is also entitled to prejudgment interest on his award of backpay calculated pursuant to the adjusted prime rate of the Internal Revenue Service. A number of courts have applied the § 6621 of the Internal Revenue Code rate of interest to backpay awards. *See, e.g. Ass'n. Against Discrimination v. City of Bridgeport*, 572 F.Supp. 494-495 (D.Conn. 1983) and cases listed therein.

The specific amount of Mayson's award cannot be stated by the court at this time. Although plaintiffs have submitted detailed facts regarding the amount of Mayson's total adjusted lost earnings as of May 17, 1985, defendants have not. It is hoped that the parties can stipulate to the award based on the court's statements above. If there is a need for an evidentiary hearing to be held to determine the amount of backpay award, the parties should request a hearing.

Plaintiff Mayson has also requested that he be reinstated at Deseret. That remedy is within the discretion of the court pursuant to 42 U.S.C. § 2000e-5(g). Defendants have not opposed Mayson's reinstatement. Accordingly, the court orders that Mayson be reinstated.

IV. *Reconsideration of Dismissal of Plaintiffs' Fourth Claim for Relief*

Plaintiffs have moved for reconsideration of the court's dismissal in Amos I of their claim for intentional infliction of emotional distress. The plaintiffs' motion is based on the addition of allegations made in their amended complaint.[19] Plaintiffs now also claim that the allegations state a cause of action for invasion of privacy.

Plaintiffs' allegations are set forth in Amos I, 594 F.

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[19]Plaintiffs were granted leave to amend after the court ruled in Amos I.

Supp. at 830. In addition, plaintiffs now allege:

> The manner in which the CORPORATIONS imposed the worthiness requirement on plaintiffs and thereafter fired plaintiffs due to their inability or unwillingness to statisfy that requirement was highly public and calculated to subject plaintiffs to humiliation and scorn from their fellow employees.

(Amended Complaint, paragraph 53). Plaintiffs have submitted the affidavits of Amos, Kanon and Mayson in support of their new allegations. Defendants have moved to strike those affidavits on the basis that the affidavits do not support a finding that the affiants have personal knowledge of the matters in their affidavits. It is the opinion of the court that the affidavits should be considered and defendants' motion to strike should be denied. However, considering the averments of both the affidavits and the fourth claim for relief of the amended complaint, the court finds as a matter of law that they do not state that level of "outrageous and intolerable" conduct contemplated by the Utah Supreme Court. *See* 594 F.Supp. 830-831. The court also finds as a matter of law that they do not state a claim for invasion of privacy. *See Restatement (2d) of Torts* § 625D comments a and c (1977). Thus, the plaintiffs' motion for reconsideration is denied.

V. *Attorney's Fees*

The court reserves the question of attorney's fees until all matters in this case are concluded.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiffs' motion for summary judgment regarding Beehive Clothing Mills is denied as genuine issues of material fact remain;

2. Plaintiffs' motion for summary judgment regarding Deseret Industries is denied. The court grants summary judgment in favor of the defendants.

3. Plaintiff Mayson is granted backpay with interest and fringe benefits and is ordered to be reinstated at Deseret Gymnasium.

4. Defendants' motion to strike is denied and plaintiffs' motion for reconsideration of the dismissal of plaintiffs' fourth claim for relief is also denied.

5. Plaintiffs' motion for attorney's fees and costs is reserved until the conclusion of the trial in this case.

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CIV. NO. C-83-0492W

CHRISTINE J. AMOS, JUDY BAWDEN, DENIECE KANON, APRIL JOYCE RIDING, AND ARTHUR FRANK MAYSON, RUTH ARRIOLA, SHELLEEN ADAMSON AND RALPH L. WHITAKER ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
PLAINTIFFS,

v.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, AND THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
DEFENDANTS.

ORDER TO COMPEL DEFENDANTS TO ANSWER PLAINTIFFS' THIRD INTERROGATORIES AND SECOND DOCUMENT REQUEST

Upon the plaintiffs' motion to compel the defendants to answer the plaintiffs' third set of interrogatories and second document request and after due consideration of the interrogatories, document requests, the defendants' objections and the memoranda filed by the respective parties and after conferring with David B. Watkiss, Esq. on behalf of

the plaintiffs and Wilford W. Kirton, Jr., Esq. on behalf of the defendants, it is hereby ORDERED:

That the defendants are hereby ordered to answer the aforesaid third interrogatories and comply with the second document requests on or before December 13, 1984.

DATED this 28th day of November, 1984.

/s/ David K. Winder
DISTRICT JUDGE

APPENDIX E

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CIV. NO. C-83-0492W

CHRISTINE J. AMOS, JUDY BAWDEN, DENIECE KANON, APRIL JOYCE RIDING, AND ARTHUR FRANK MAYSON, RUTH ARRIOLA, SHELLEEN ADAMSON AND RALPH L. WHITAKER ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
PLAINTIFFS,

v.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, AND THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
DEFENDANTS.

ORDER MODIFYING SCHEDULE ORDER

Notwithstanding the scheduling order signed by Honorable Calvin Gould, United States Magistrate, and by counsel for the respective parties on July 9, 1984, it is hereby ORDERED:

***

Resolution of plaintiffs' class action claims shall be deferred until after the claims of the named plaintiffs have been resolved by motion or trial.

Dated this 28th day of November, 1984.

/s/ David K. Winder

UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CIV. NO. C-83-0492W

CHRISTINE J. AMOS, JUDY BAWDEN, DENIECE KANON, APRIL JOYCE RIDING, AND ARTHUR FRANK MAYSON, RUTH ARRIOLA, SHELLEEN ADAMSON AND RALPH L. WHITAKER ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
PLAINTIFFS,

v.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, AND THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
DEFENDANTS.

CERTIFICATION PURSUANT TO 28 U.S.C. § 2403, AND ORDER REGARDING INTERVENTION

TO: The Honorable Edwin Meese, III, and
The Honorable David L. Wilkinson

CERTIFICATION PURSUANT TO 28 U.S.C. § 2403

The United States District Court for the District of Utah hereby certifies to the Attorney General of the United States that the constitutionality of an Act of Congress, Title 42, Section 2000e-1 (as amended), *United States Code*, is drawn in question in the above-captioned case, to which neither the United States, nor any agency thereof, nor any officer or employee, as such officer or employee, is a party.

Said Court further certifies to the Attorney General of the State of Utah that the constitutionality of an Act of the legislature of the State of Utah, *Utah Code Ann.* § 34-35-2(5), is drawn in question in the above-captioned case, to which neither the State of Utah, nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party.

ORDER REGARDING INTERVENTION

This action has been pending since April 4, 1984. In January 1984, this Court rendered its decision on defendants' motion to dismiss or for summary judgment, reported at 594 F.Supp. 791 (D.Utah 1984), wherein this Court held, *inter alia,* that the federal and state statutes cited above were unconstitutional as applied. In September 1985, this Court rendered its decision on plaintiffs' motion for summary judgment reported at 618 F.Supp. 1013 (D.Utah 1985), wherein the Court, *inter alia,* granted plaintiffs' motion with respect to the Title VII claim of plaintiff Arthur Frank Mayson. On January 22, 1986 this Court entered final judgment for plaintiff Arthur Frank Mayson, having granted this motion, pursuant to Fed. R. Civ. P. 54(b) on January 13, 1986. On January 28, 1986, defendants moved, pursuant to Fed. R. Civ. P. 59, for vacation of the Court's January 22, 1986, judgment pending certification pursuant to 28 U.S.C. § 2403. The defen-

dants' motion was granted by the Court on February 4, 1986.

In light of the foregoing,

IT IS ORDERED that:

1. The United States and the State of Utah shall have thirty (30) days from the date of this Order to file and serve a motion to intervene in this action pursuant to 28 U.S.C. § 2403(a) and (b) and Fed.R.Civ. P. 24, should they choose to do so.

2. If the United States and/or the State of Utah move(s) to intervene as provided above, each intervenor shall set forth to the greatest extent practicable in its moving papers the manner in which the intervenor desires to participate in this action.

3. In the event that the United States and/or the State of Utah move(s) to intervene as provided above, the Court shall hold a scheduling conference not later than fifteen (15) days after the filing of such motion(s), at which counsel for each intervenor shall attend, and at which a schedule for the participation of each intervenor in this action will be established.

4. In the event that no intervention is filed within thirty (30) days from the date of this certification, as provided in Paragraph 1 above, no intervention thereafter will be permitted and the Court will promptly re-enter its January 22, 1986, Order and Final Judgment.

SO ORDERED this 5th day of February, 1986.

UNITED STATES DISTRICT COURT

/s/ David K. Winder

The Honorable David K. Winder

APPENDIX G

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CIV. NO. C-83-0492W

CHRISTINE J. AMOS, JUDY BAWDEN, DENIECE KANON, APRIL JOYCE RIDING, AND ARTHUR FRANK MAYSON, RUTH ARRIOLA, SHELLEEN ADAMSON AND RALPH L. WHITAKER ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
PLAINTIFFS,

v.

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, AND THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,
DEFENDANTS,

UNITED STATES OF AMERICA,
INTERVENOR

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1252 and 2403(a), the Defendants Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints appeal direct-

ly to the Supreme Court of the United States (1) from the judgment of this Court entered pursuant to FRCP Rule 54(b) and dated May 16, 1986; (2) from each and every part of the Court's Memorandum Decision and Order dated January 11, 1984 (and corrected January 20, 1984), except for those portions granting the Defendants' motion to dismiss the Plaintiffs' claims brought pursuant to state or common law; (3) from an Order requiring the Defendants to answer interrogatories and document requests dated November 28, 1984; and (4) from each and every part of the Court's Memorandum Decision and Order dated September 18, 1985, except those parts which denied the Plaintiffs' motion for summary judgment and granted Defendants summary judgment with respect to Deseret Industries.

Pursuant to Rule 28.4(b) of the Rules of this Court, the Defendants state that the United States District Court for the District of Utah has certified this matter pursuant to 28 U.S.C. § 2403(a) to the Attorney General of the United States and the United States has intervened as a party.

Pursuant to Rule 28.4(c) of the Rules of this Court, the Defendants state that the United States District Court for the District of Utah has certified this matter pursuant to 28 U.S.C. § 2403(b) to the Attorney General of the State of Utah who has declined to intervene.

DATED: Salt Lake City, Utah
June 9, 1986

Respectfully submitted,
KIRTON, McCONKIE & BUSHNELL

By /s/ Wilford W. Kirton, Jr.
Wilford W. Kirton, Jr.
Attorneys for Defendants

APPENDIX H

The Utah Anti-Discriminatory Act, Utah Code Ann. § 34-35-2(5) provides:

> (5) "Employer" means the state or any political subdivision or board, commission, department institution or school district thereof, and every person employing 25 or more employees within the state; but it does not include religious organizations or associations, religious corporations sole, nor any corporation or association constituting a wholly owned subsidiary or agency of any religious organization or association or religious corporation sole.

Section 34-55-6(1) provides, in part:

> (1) It is a discriminatory or prohibited employment practice:
>
> (a) for an employer to refuse to hire, or promote, or to discharge, demote, terminate any person, or to retaliate against, or discriminate in conditions of employment against any person otherwise qualified, because of race, color, sex, age, religion, national origin, or handicap. No applicant may be considered "otherwise qualified", unless he possesses the education, training, ability, moral character, integrity, disposition to work, adherence to reasonable rules and regulations, and other job related qualifications required by an employer for any particular job, job classification, or position to be filled or created.

Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3) (2)

Nos. 86-179 and 86-401

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and THE UNITED STATES OF AMERICA,

Appellants,

v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPELLEES' MOTION TO AFFIRM

ELIZABETH T. DUNNING
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39pp

QUESTIONS PRESENTED

1. Whether the district court correctly held that Section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, as amended, is unconstitutional under the Establishment Clause of the First Amendment, as applied to exempt from Title VII liability the private appellants' firing of appellee Arthur Frank Mayson for solely religious reasons, when Mayson's job as a building maintenance engineer at a public gymnasium owned by appellants required him to perform only secular, nonreligious tasks, when the gymnasium is engaged in only secular, nonreligious activities, when no sincerely held religious belief of appellants is implicated by the gymnasium's activities or the employment practices challenged here, and when the effect of §702's unbounded immunity is solely to give religious employers the ability to coerce religious adherence from their employees thus abridging the employees' freedom of religious conscience?

2. Whether the district court correctly held that the private appellants are liable to appellee Mayson for the Title VII remedy of backpay as a result of their firing Mayson for religious reasons when they purported to rely on the permissive exemption contained in §702 to justify Mayson's termination?

PARTIES

The private parties are identified in the Jurisdictional Statement filed by the private defendants in this case, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, No. 86-179, at page ii (hereinafter "CPB J.S."). Having intervened in this action in the district court, the United States has also filed a Jurisdictional Statement, *United States v. Amos*, No. 86-401 (hereinafter "U.S. J.S.").

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Nos. 86-179 and 86-401

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and THE UNITED STATES OF AMERICA,

Appellants,

v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16.1(c) and (d) of the Rules of this Court,[1] appellees move to affirm the judgment of the United States District Court for the District of Utah.

[1] By Letter of the Clerk of this Court dated August 11, 1986, appellees' time to move under Rule 16 in No. 86-179 was extended to October 14, 1986, to coincide with the time for such a motion in No. 86-401.

STATEMENT OF THE CASE

The district court's Final Judgment and Order of May 16, 1986, (App. 83a-87a)[2] adjudicated the claims only of appellee Arthur Frank Mayson. A review of the facts underlying Mayson's claim demonstrates both the narrowness and correctness of the decision of the district court.[3]

The Deseret Gymnasium (the Gym) is a public gymnasium in Salt Lake City, Utah, owned and operated by appellants, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints (collectively "the Corporations"). In December 1964, Mayson was hired to work at the Gym as the assistant building engineer. In 1972, he was promoted to building engineer, a position he held until he was fired on April 10, 1981. When hired in 1964, Mayson was not asked if he was eligible for a Mormon "temple recommend",[4] nor was he told that eligibility was a condition for his employment. Although Mayson is nominally a member of the Mormon Church, he has never qualified for a temple recommend. During his 16 years of employment at the Gym, he received a promotion and frequent merit pay increases.

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[2] "App." refers to the appendix to the Jurisdictional Statement filed by appellants in No. 86-179.

[3] The facts are taken from the Affidavit of Arthur Frank Mayson, dated August 16, 1983, submitted to the district court in opposition to the Corporations' motion to dismiss or, alternatively, for summary judgment.

[4] *See* CPB J.S. at 4 n.2.

In the fall of 1980, Mayson was informed that the Corporations were now requiring that employees qualify for a Mormon temple recommend as a condition of employment. His employer had determined that Mayson was not eligible because he was not regularly attending Mormon Church services and he was not complying with the Mormon Church's requirement that its members pay a tithe of 10% of their pretax income. Mayson was told that if he did not become eligible for a temple recommend within six months, he would be fired. Believing that his job at the Gym had nothing to do with religious matters, Mayson refused to comply. He was fired on April 10, 1981, solely because he had not qualified for a Mormon temple recommend. At that time, Mayson was 56 years old and had been employed at the Gym for over 16 years.

During Mayson's employment, non-Mormons were employed in various positions at the Gym, including those of lifeguard, janitor, athletic instructor and squash pro. At least two non-Mormons were employed at the Gym after Mayson's termination.

Mayson, together with six employees of another Mormon Church-owned operation, Beehive Clothing Mills, who also had been fired from positions they had held for several years solely because of their failure to satisfy the newly imposed temple recommend requirement, filed this action contending that their terminations violated Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) which, *inter alia*, prohibits religious discrimination in employment. Appellees

alleged that, to the extent that the Corporations attempted to rely on the exemption for religious corporations, associations, educational institutions or societies contained in §702, to shield their admittedly religiously based firings of appellees from Title VII liability, that reliance was misplaced because §702, as applied to employees performing secular, non-religious activities, violates the Establishment Clause of the First Amendment.

The Corporations moved to dismiss or for summary judgment. The district court denied the Corporations' motion. 594 F.Supp. 791 (App. 1a-82a). It held that, as applied to Mayson's employment at the Gym, §702 violates the Establishment Clause. Acknowledging that the religious activities of religious organizations properly could be exempt from Title VII liability for religious discrimination, the court considered whether the Gym was, in fact, a religious activity. The court found:

> . . . [T]here is nothing in the running or purpose of Deseret [Gymnasium] that suggests that it was intended to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration. Rather, its primary function is to provide facilities for physical exercise and athletic games. Deseret is open to the public for annual membership fees or for daily or series admission fees. It offers the same facilities and services that are available at other gymnasiums, and the employees perform the same jobs that are performed at any public gymnasium or athletic club. . . . More importantly, there is no evidence or a contention that the re-

> ligious tenets of the Mormon Church involve or require religious discrimination is employment. . . . Furthermore, the [defendants] do not contend and there is no evidence that it is a fundamental tenet of the Mormon Church that its members must engage in physical exercise and activity and must do so in a gymnasium owned and operated by the Mormon Church and in which all employees are practicing members of the Mormon Church. In addition, defendants do not contend and there is no evidence that engaging in physical exercise is a religious ritual of the Mormon Church, or that Deseret is used as a means of teaching or spreading the Mormon Church's religious beliefs or practices. . . .
>
> As the building engineer, plaintiff Mayson was responsible for maintaining the physical facility at Deseret, the equipment in the facility and the grounds outside the facility. . . .
>
> None of [Mayson's] duties is even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration. Furthermore, none of those duties can potentially further any alleged religious activity in which Deseret may engage. Thus, there is no basis on which the court can find that this case, as it relates to Deseret, involves religious activities.

594 F.Supp. at 800-02 (App. 13a-18a) (footnotes and citations omitted).

The district court's findings were reached prior to any discovery and on the basis of the Corporations' motion for summary judgment. Appellants do not challenge them.

While two lower federal courts and a legal commentator have suggested that the §702 exemption is un-

constitutional as applied to secular activities of religious employers,[5] the court below is the first squarely to decide the question. In concluding that, as applied to Mayson's employment at the Gym, §702 violates the Establishment Clause, the district court first correctly rejected the Corporations' contention that applying Title VII's proscription against religious discrimination to religious employers with respect to their secular activities would unconstitutionally entangle Church and State. That conclusion was firmly supported by the facts that Congress has not chosen to exempt religious employers totally from Title VII liability, that this case does not involve internal church conflicts over doctrine, practice or discipline, and that the federal courts can and do analyze the religious content of activities and jobs performed by employees of religious employers to determine whether the National Labor Relations Act and Title VII's proscription against discrimination on the basis of race, color, sex and national origin apply to religious employers. *See* 594 F.Supp. at 814-17 (App. 43a-52a); *see also* note 9, *infra*.

Next, the court rejected the Corporations' claim that the Free Exercise Clause requires immunity from Title VII liability. Noting that, as applied to Mayson, enforcement of Title VII's prohibition against religious discrimination does not conflict with Mormon doctrine or prohibit an activity rooted in religious belief, the court found

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[5] *See King's Garden, Inc. v. F.C.C.*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974); *Feldstein v. Christian Science Monitor*, 555 F.Supp. 974 (D. Mass. 1983); Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM.L.REV. 1514, 1547-48(1979).

that the Mormon Church's free exercise rights are not burdened. The court observed, however, that even if this case did impact on the exercise of a sincerely held belief, the Free Exercise Clause would not be violated because Title VII's purpose to eliminate all forms of employment discrimination "is equally if not more compelling than other interests which have been held to justify legislation that burdens the exercise of religious convictions." 594 F.Supp. at 817-20 (App. 52a-58a), *quoting E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982).

Since the unbounded §702 exemption is not constitutionally required, the court analyzed its constitutionality under the Establishment Clause, guided principally by the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). It concluded that, although Congress had a permissible secular purpose in enacting §702, the direct and immediate effect of the exemption was impermissibly to advance religion. 594 F.Supp. at 820-26 (App. 58a-70a). Accordingly, the court refused to dismiss appellees' Title VII claims, and held that §702, as applied to Mayson, is unconstitutional.

The parties then conducted some discovery. As to Mayson, discovery focused on the facts needed to determine the backpay to which Mayson was entitled. The Corporations claimed that even if Mayson's firing violated Title VII, they should not be liable for backpay because they had relied on the permissive exemption in §702. On appellees' motion for summary judgment, the district court rejected that argument, noting that there is

a strong presumption in favor of backpay awards in Title VII cases and that a denial of backpay would frustrate Title VII's purpose of making Mayson whole for his injuries from the Gym's discrimination. 618 F.Supp. at 1027-29 (App. 116a-120a).

After the issue of the Corporations' backpay liability had been resolved, the parties stipulated to the amount of backpay to which Mayson was entitled. Appellees then promptly moved for entry of final judgment for Mayson pursuant to FED.R.CIV.P. 54(b). That judgment, first entered in January 1986, was vacated to permit certification to the Attorney General under 28 U.S.C. §2403. The United States intervened and filed a memorandum urging the district court to reconsider its conclusion that §702 is unconstitutional, as applied. After reviewing memoranda from the United States and appellees and hearing argument, the district court reaffirmed its earlier decisions and re-entered final judgment for Mayson.[6]

THE MOTION TO AFFIRM SHOULD BE GRANTED

The district court has decided only that §702 is unconstitutional as applied to Mayson's employment at the Gym; thus, that his firing for admittedly religious reasons violated Title VII and that he is entitled to Title VII's backpay remedy. Summary affirmance is appropriate be-

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[6] The district court has granted summary judgment in favor of the Corporations dismissing the claims of one of the plaintiffs below, Ralph Whitaker. 618 F.Supp. at 1022-27 (App. 105a-116a). The district court has not resolved the claims of the appellees who were former employees at Beehive Clothing Mills. *See id.*, at 1016-1022 (App. 93a-105a).

cause (1) this is the first case to hold that §702 is unconstitutional as applied, and the facts which support that holding are narrow and compelling; (2) the decision in light of those facts is clearly correct; (3) there is no conflict among the lower courts on the constitutional issue; and (4) the district court's backpay award is wholly consistent with Title VII's purpose.

1. The facts supporting the judgment for Mayson are narrow and compelling. The activities of the Gym are undisputedly secular. There is no contention that those activities or Mayson's firing are mandated by any sincerely held Mormon religious belief. This is a clear case of a religious employer simply using the §702 exemption to coerce religious loyalty through the economic power that an employer enjoys over its employees. This is a clear case of an advantage being granted to religious employers over non-religious employers without any First Amendment justification therefor. The inquiry as to whether the activity in question is religious or secular was not unduly intrusive: the matter was resolved on a motion for summary judgment prior to any discovery. And it is a case where prohibiting religious discrimination by a religious employer against a secular employee strengthens First Amendment values by protecting the employee from economically coerced religious loyalty.

2. The district court's decision was clearly correct.

a. Congress' decision to grant an exemption from the scope of Title VII liability drawn strictly on religious grounds plainly implicates Establishment Clause concerns. *King's Garden, Inc., supra; Feldstein, supra; see*

Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972). In analyzing the constitutionality of §702, the district court was correctly guided by the three independent tests set forth in *Lemon, supra. See Witters v. Washington Dep't of Services for the Blind*, 106 S.Ct. 748 (1986); *Grand Rapids School District v. Ball*, 105 S.Ct. 3216 (1985); *Aguilar v. Felton*, 105 S.Ct. 3232 (1985); *Estate of Thornton v. Caldor, Inc.*, 105 S.Ct. 2914 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

b. Appellees below argued that §702 lacks a valid secular purpose because its purpose is simply to invite religious employers to discriminate where all other employers may not discriminate. *See King's Garden, Inc., supra*, 498 F.2d at 55. The district court disagreed, finding a valid purpose of "assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions . . ." 594 F.Supp. at 812 (App. 40a).

If that was really Congress' purpose, it would have exempted religious employers altogether from the scope of Title VII, something that it has refused to do. Religious employers are subject to Title VII's prohibition against discrimination on the basis of race, color, sex and national origin. By refusing to exempt religious employers totally from Title VII, Congress demonstrated that it was not its purpose to avoid "meddling" in their affairs. But by permitting religious employers to discriminate on the basis of religion in all of their activities, Congress invited religious employers to coerce religious loyalty through the economic power that employment gives an employer over an

employee. Such a purpose to advance religion is improper.

Even if supported by a permissible purpose, §702 is far broader than necessary to protect the legitimate First Amendment interests of religious employers. Appellants suggest that because Congress arguably had a permissible purpose to accommodate religion, the effect of the broad §702 exemption is necessarily permissible. There is no support for that position:

> . . . the propriety of a legislature's purpose may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State.

Committee for Public Education v. Nyquist, 413 U.S. 756, 774 (1973); *see id.*, at 788-89. Where the two religion clauses seem to pull in conflicting directions, statutes must be narrowly and carefully drawn. *Widmar v. Vincent*, 454 U.S. 263, 269-270 (1981); *see Larson v. Valente*, 456 U.S. 228, 246-47 (1982).[7]

Two recent decisions illustrate this point. In *Estate of Thornton, supra*, a state statute which attempted to accommodate religion by giving each employee an absolute right to designate a particular day as his Sabbath and prohibiting his employer from dismissing the

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[7] None of the cases cited by the Corporations for the proposition that Congress has broad discretion in exercising its commerce clause powers — *Davis v. Passman*, 442 U.S. 228 (1979); *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946); *Currin v. Wallace*, 306 U.S. 1 (1939); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) — involve legislation in areas where the religion clauses conflict.

employee for refusing to work on that day was held to violate the Establishment Clause. This Court affirmed the state court's determination that the statute was unconstitutional since it had an impermissible primary effect of advancing religion. This was so, the Court concluded, because of the statute's "unyielding weighting in favor of Sabbath observers over all other interests" including the interests of "[o]ther employees who have strong and legitimate, but nonreligious reasons for wanting a weekend day off . . ." 105 S.Ct. at 2918 & n.9. Thus, a statute intended to accommodate religion may have an unconstitutional effect when it is overly broad or unyielding to legitimate countervailing interests.

Similarly, in *Grendel's Den, Inc., supra,* this Court invalidated a state statute giving schools and churches the power to veto the issuance of liquor licenses to establishments in their vicinity. Accepting the state's contention that the statute had a valid secular purpose, 459 U.S. at 123, the Court still struck down the law under the effect and entanglement prongs of the *Lemon* test. In so doing, the Court observed:

> There can be little doubt that [the statute] embraces valid secular legislative purposes. However, these valid secular objectives can be readily accomplished by other means . . .

Id., at 124.[8]

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[8] The state in *Grendel's Den* sought to justify the statute under the broad powers enjoyed by the states under the Twenty-First Amendment. This Court noted that "the State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment." 459 U.S. at 122, n.5.

The court in *King's Garden, Inc., supra,* accurately defined the scope of congressional discretion in this sensitive area:

> "The Court must not ignore the danger that an exemption from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exemption no matter how vital it may be to the protection of values promoted by the rights of free exercise." . . . *Wisconsin v. Yoder,* 406 U.S. 205, 220-21 (1972).
>
> . . . In this matter of exemptions the First Amendment strings a "tight rope" between the two religion guarantees, *Walz v. Tax Commission,* . . . 397 U.S. [664] 672 [(1970)], . . .
>
> From 1964 to 1972 Congress had, in our view, a firm purchase on the tightrope. The exemption then granted by the Civil Rights Act to the *religious* activities of religious organizations was itself required by the First Amendment.
>
> * * *
>
> But the 1972 exemption [contained in §702] now shelters myriad "activities" which have not the slightest claim to protection under the Free Exercise, Free Speech, or Free Press guarantees. It is arguable that Congress may, without violating the Establishment Clause, expand a religious exemption *somewhat* beyond the minimal boundaries created by the several First Amendment liberties. *See, Walz v. Tax Commission, supra*[;] . . . *Zorach v. Clauson,* 343 U.S. 306 (1952). . . . But these isolated decisions create no precedent for the unlimited 1972 exemption.

498 F.2d at 55-57 (emphasis in original); *see Feldstein, supra,* 555 F.Supp. at 978-79.

In most contexts, Congress and the courts have determined that labor laws should apply to religious employers[9] except in cases, unlike this one, where compelling First Amendment concerns require an exemption.[10]

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[9] *See, e.g., Tony & Susan Alamo Foundation v. Sec'y of Labor*, 105 S.Ct. 1953 (1985) (Fair Labor Standards Act applies to religious employers); *United States v. Lee*, 455 U.S. 252 (1982) (religious employer must pay social security taxes for employees notwithstanding religious objection); *Volunteers of America-Minnesota v. N.L.R.B.*, 752 F.2d 345 (8th Cir.), *cert denied*, 105 S.Ct. 3502 (1985) (NLRB has jurisdiction over employees of church owned residential treatment center); *Denver Post of the Nat'l Soc'y of the Volunteers of America v. N.L.R.B.*, 732 F.2d 769 (10th Cir. 1984) (NLRB has jurisdiction over employees of religious organization's social programs); *St. Elizabeth's Community Hospital v. N.L.R.B.*, 708 F.2d 1436 (9th Cir. 1983) (NLRB has jurisdiction over employees of religious hospital); *Tressler Lutheran Home for Children v. N.L.R.B.*, 677 F.2d 302 (3d Cir. 1982) (NLRB has jurisdiction over employees of religious nursing home); *N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (NLRB has jurisdiction over church-operated home for neglected children); *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985) (state labor relations board has jurisdiction over parochial school's lay teachers); *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (EEOC has jurisdiction over sex discrimination claims against religious school); *E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (Title VII prohibits sex discrimination by religious publishing house); *King's Garden, Inc. v. F.C.C., supra* (FCC may proscribe religious discrimination by religious licensees); *cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S.Ct. 2718 (1986).

[10] *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 3333 (1986). The constitutional exemption from Title VII recognized in *McClure* and *Rayburn* is limited to employees performing ministrial functions. Appellants' reliance on this Court's decision in *Catholic Bishop* is wholly misplaced. The federal courts have limited the scope of the *Catholic Bishop* exemption from NLRB jurisdiction to religious schools and have held that the Labor

There is a strong national policy to apply important federal labor laws, such as Title VII, to religious organizations absent a compelling First Amendment reason not to do so. *See, e.g., E.E.O.C. v. Fremont Christian School, supra,* 781 F.2d at 1368-69; *E.E.O.C. v. Pacific Press Pub. Ass'n, supra,* 676 F.2d at 1280. No such reason exists for exempting an employee such as Mayson from the protections of Title VII.

Far from being routinely upheld,[11] religious exemptions are constitutionally suspect. *See Wisconsin v. Yoder, supra,* 406 U.S. at 220-21. For example, *Estate of Thornton, supra,* involved an exemption from the general rule of employment-at-will by providing employees the absolute right to a day off for their designated Sabbath without fear of termination. The Connecticut court struck down the statute on the ground that its primary effect was to advance religion because the statute "confers its benefit on an explicitly religious basis." *Caldor, Inc. v. Thorn-*

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[10] *Continued*

Board may assert jurisdiction over a broad variety of activities of religious organizations similar to those involved in this case. *See, e.g., Volunteers of America-Minnesota, supra; Denver Post of the Nat'l Soc'y of the Volunteers of America, supra; Tressler Lutheran Home for Children, supra.*

[11] Appellants claim that this Court has frequently upheld exemptions from generally applicable statutes or rules for religious institutions and individuals. U.S. J.S. at 10. That is plainly not true. *See, e.g., Bowen v. Roy,* 106 S.Ct. 2147 (1986); *Goldman v. Weinberger,* 106 S.Ct. 1310 (1986); *Tony & Susan Alamo Foundation, supra; United States v. Lee, supra.* In these cases, this Court denied the claim for an exemption, even though the party seeking the exemption on religious grounds contended that the generally applicable statute or rule conflicted with a sincerely held religious belief. Here, there is no such conflict.

ton, 464 A.2d 785, 794 (Conn. 1983). This Court affirmed, observing that the statute gives "sabbath observers the valuable right to designate a particular weekly day off. . . . Othr employees who have a strong and legitimate, but non-religious reason for wanting a weekend day off have no rights under the statute." 105 S.Ct. at 2918 & n.9. *See Welsh v. United States*, 398 U.S. 333 (1970); *id.*, at 356-57 (Harlan, J., concurring).[12]

As the cases above amply demonstrate Congress may not have been constitutionally obliged to prohibit religious discrimination in private employment; but having decided to do so, it created serious Establishment Clause concerns by exempting religious employers from liability for religious discrimination against employees

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[12] Any suggestion that §702's explicit religious distinction is permissible because religious organizations have a greater interest in practicing religious discrimination in employment than do "non-religious" employers is factually doubtful and constitutionally irrelevant. Many private employers who would not qualify as a "religious corporation, association . . . or society" within the meaning of §702, may, nonetheless, have strong and sincerely held religious beliefs which conflict with the edicts of federal and state labor law. *See, e.g., United Sates v. Lee, supra* (sincerely held religious belief prohibiting participation in social security system); *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), *app. dismissed sub nom., Sports & Health Club, Inc. v. Minnesota*, 106 S.Ct. 3315 (1986) (born-again Christian owners of commercial health spas not entitled to discriminate in employment on basis of religion, notwithstanding sincerely held religious beliefs). The interests of the employers in *Lee* and *Sports & Health Club* in an exemption from the social security laws or the state antidiscrimination laws were much stronger than the interest of the Corporations here since those interests were based on sincerely held religious beliefs, whereas no such beliefs dictated the discrimination against Mayson.

engaged in secular non-religious activities.[13]

c. As the district court correctly concluded, §702 has the impermissible effect of advancing religion. The Corporations have used the power §702 gives them to extract from their secular employees religious obedience and substantial economic concessions. One of the religious requirements imposed on appellees and one of the reasons for the termination of several of them was noncompliance with the Mormon Church's tithing requirement. *See, e.g.*, Affidavit of Arthur Frank Mayson, dated August 16, 1983, ¶¶ 13, 19, 20, 22. That requirement demands payment of 10% of an individual's gross income to the Mormon Church. Appellees have never questioned the Mormon Church's right to impose a tithing requirement — or any other requirement — on its members. However, permitting the Corporations to impose such a requirement on all of their employees, as §702 does here, impermissibly advances religion. The ability to coerce the return of 10% of an employee's gross income gives church-owned businesses an impermissible competitive advantage over non-religiously-owned ones.[14]

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[13] If Congress had withdrawn the prohibition against all religious discrimination, *Crawford v. Board of Education*, 458 U.S. 527 (1982), might be germane However, *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), a companion case to *Crawford*, is instructive. There, the Court struck down on equal protection grounds a state initiative because it used the racial nature of the busing issue to define governmental decision-making structures. Religious classifications, like racial classifications, are suspect under both the Equal Protection Clause and the Establishment Clause. *See Widmar v. Vincent, supra; Larson v. Valente, supra; King's Garden, Inc., supra.*

[14] *See Tony & Susan Alamo Foundation, supra*, 105 S.Ct. at 1961 (rejecting a religious organization's claim for exemption from minimum

Section 702 also gives religious employers a competitive advantage in maintaining the productivity and discipline of their employees. Non-religious employers must rely on secular benefits and punishments, together with the strength, quality and benevolence of management to insure productivity and discipline. Section 702, however, permits religiously affiliated employers to invoke spiritual concerns and otherworldly blessings and punishments in controlling their work forces. Where the activities and jobs are not of a religious nature, this impermissibly gives religiously affiliated employers a secular advantage over non-religious employers.

Section 702 impermissibly enables religions to advance their religious goals through secular job-related coercion. In this respect, appellants' reliance on *Zorach v. Clauson, supra,* is ironic. There, Justice Douglas stated:

> We sponsor an attitude on the part of Government that . . . lets each [religious group] flourish according to the zeal of its adherents and the appeal of its dogma.

343 U.S. at 313-314. That is precisely what §702 does not do. Rather than letting each religion flourish according to the zeal of its adherents and the appeal of its dogma, §702 invites religions to flourish through the economic coercion they can exercise over employees by virtue of the employment relationship.

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[14] *Continued*

wage laws because "the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of 'unfair method of competition' that [the Fair Labor Standards Act] was intended to prevent, . . . and the admixture of religious motivations does not alter a business's effect on commerce.")

This Government grant of coercive assistance impermissibly confers on religious employers symbolic benefits as well. *See Grand Rapids School District v. Ball, supra,* 105 S.Ct. at 3226. In an area as heavily regulated as the employment relationship in modern American society, Government sanctioned religious discrimination by religious employers, where there is no religious justification for such discrimination, conveys a message of Government endorsement of practices which coerce religious loyalty and encourage religious intolerance.

In addition to economic efficiency, Title VII's proscription against employment discrimination vindicates concerns for fairness, equality and the dignity of all persons. Discrimination violates deeply and widely held views of elementary justice. *See Roberts v. United States Jaycees,* 468 U.S. 609 (1984); *Bob Jones University v. United States,* 461 U.S. 574, 592 (1983); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). The broad exemption in §702 seriously undercuts those values. Concerns for equal employment opportunity, personal autonomy and religious liberty fully support limiting the breadth of the §702 exemption as the district court has done.

d. The district court correctly concluded that §702 lacks the characteristics which have served to sustain statutes under the Establishment Clause. Appellants are flatly wrong when they contend that this Court has frequently approved exemptions drawn on religious lines. More frequently, it has invalidated or denied them. *See, e.g., Bowen v. Roy, supra; Goldman v. Weinberger, supra;*

Estate of Thornton, supra; Tony & Susan Alamo Foundation, supra; United States v. Lee, supra; Welsh v. United States, supra. This Court has warned of the "danger that an exemption from the general obligations of citizenship on religious grounds may run afoul of the Establishment Clause . . ." *Wisconsin v. Yoder, supra,* 406 U.S. at 220-21, and has emphasized that the facial neutrality of a statute is important. *See Witters, supra,* 106 S.Ct. at 752; 594 F.Supp at 822-24 (App. 61a-66a)[15]

The district court was similarly correct that the §702

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[15] The cases cited by the United States do not support its argument. *United States v. Lee, supra,* denied an exemption from the employer's duty to pay social security taxes for his employees. *St. Martin's Lutheran Church v. South Dakota,* 451 U.S. 772 (1981), was decided purely as a matter of statutory construction and did not involve any claim that the exemption violated the Establishment Clause. *Catholic Bishop, supra,* held, as a matter of statutory construction, that the NLRB lacks jurisdiction over parochial schools. However, *Catholic Bishop* has been narrowly construed by the federal courts and has been deemed not to bar Labor Board jurisdiction over a wide variety of other religiously affiliated activities. *See* note 9, *supra. Braunfeld v. Brown,* 366 U.S. 599 608-09 (1961)' does not endorse religious exemptions and does not address the Establishment Clause issue. *Gillette v. United States,* 401 U.S. 437 (1971), only involved the question of whether conscientious objector status was available to persons objecting to a particular war rather than all wars, as the statute required. Significantly, *Gillette* followed the Court's decision in *Welsh* which read out of the statute the requirement that the conscientious objector's objection to war be religiously based. The crypic discussion of religious exemptions in *Selective Draft Law Cases,* 245 U.S. 366, 389-90 (1918), also must be read in light of *Welsh. Walz v. Tax Commission, supra,* sustained a tax exemption principally on the grounds that it was available to a wide variety of nonprofit organizations. Finally, *Zorach v. Clauson, supra,* which sustained release of public school students for religious instruction, has been essentially limited to its facts. *See King's Garden, Inc., supra.*

exemption lacks the historical tradition which served to support the property tax exemption in *Walz* or the legislature's chaplain in *Marsh v. Chambers*, 463 U.S. 783 (1983). Prior to enactment of the Civil Rights Act of 1964, all private employers were free, as a matter of federal law, to discriminate on all of the bases now prohibited by Title VII. However, since the passage of Title VII and other federal laws governing the employment relationship during the twentieth century, this Nation's historical tradition has been to apply labor laws to religious employers except where the First Amendment clearly requires an exemption. *See* notes 9 & 10, *supra*.

Finally, the district court correctly found that notions of religious accommodation have little relevance here. 594 F.Supp at 824-825 (App. 66a-68a). In the cases in which this Court has endorsed exemptions from generally applicable laws to accommodate religion, accommodation could be accomplished without infringing on the rights of third parties. *See, e.g., Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Walz v. Tax Commission, supra*. Where, as here, accommodation seriously trenches on the rights of others, accommodation has been rejected. *See, e.g., Estate of Thornton, supra; United States v. Lee, supra*.[16]

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[16] Title VII already contains ample protection for the legitimate First Amendment rights of religious employers. First, religious schools are exempt under a different exemption, 42 U.S.C. §2000e-2(e)(2). Second, the courts have recognized a constitutionally based exemption for employees performing minister-like functions. *See Rayburn, supra; McClure, supra*. Third, §703(e)(1) of Title VII provides that religious qualifications may be imposed where they

In sum, the district court clearly did not err when it held that §702, as applied to the secular, non-religious activities at issue in Mayson's case, violates the Establishment Clause.

e. The district court correctly concluded that:

> . . . the application of Title VII to religious organizations engaging in religious discrimination in secular, non-religious activities, does not excessively entangle the Government with the religious organizations.

594 F.Supp at 817 (App. 52a). The United States does not and cannot seriously challenge that conclusion since it has been a party in most of the cases relied on by the district court which have held that the National Labor Relations Act, Title VII, the Social Security Act, and the Fair Labor Standards Act can and should be applied to religious employers without giving rise to excessive entanglement.[17]

In many of these cases the courts have analyzed, in a manner very similar to the district court's analysis here, the religious content of activities in which religious organizations engage and of jobs performed by their employees to determine whether or not the employer should be exempt from federal labor laws. And these courts have consistently rejected the claim that such an analysis

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[16] *Continued*
constitute a bona fide occupational qualification. *See* 42 U.S.C. §2000e-2(e)(1). These protections, together with §702 as limited by the district court, adequately safeguard legitimate First Amendment concerns.

[17] *See* cases cited in note 9, *supra*.

involves excessive entanglement. *See, e.g., Tony & Susan Alamo Foundation, supra; E.E.O.C. v. Fremont Christian School, supra; E.E.O.C. v. Pacific Press Pub. Co., supra; Volunteers of America-Minnesota v. N.L.R.B., supra; Denver Post of the Nat'l Soc'y of the Volunteers of America v. N.L.R.B., supra.*[18]

Appellants, however, attempt to raise entanglement concerns through a "slippery slope" argument. Before the district court, the United States conceded that "Mr. Mayson's case may have seemed relatively easy to resolve" (Memorandum of Intervenor United States in Support of the Constitutionality of 42 U.S.C. §2000e-1, at 32), and that "this [c]ourt's holding as applied to Mr. Mayson may appear to be correct . . ." (*Id.*, at 31, n.12). But appellants suggest that harder cases may come along. That may very well be true. The risk that more difficult cases may arise in the future, however, does not justify an unconstitutional application of §702 here.[19]

Indeed, slippery slope arguments cut the other way.

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[18] Contrary to the suggestion of appellants, the district court did not decide any matter concerning the validity, truthfulness or propriety of the Mormon Church's practices or beliefs. Nor did the district court become involved in internal church conflicts over religious doctrine, practice or discipline. *See* 594 F.Supp. at 817-18, n.49 (App. 52a-53a, n.49).

[19] The district court's decision with respect to the claims of plaintiff Ralph Whitaker, a truck driver at Deseret Industries, demonstrates that the district court's analysis provides more than ample solicitude for the First Amendment rights of religious employers. *See* 618 F.Supp. at 1022-1027 (App. 105a-116a). Appellees have not cross-appealed from the district court's holding with respect to Whitaker. We point out only that exempting Whitaker from the protections of Title VII was not constitutionally required.

While harder cases may arise, cases even easier than Mayson's also will arise. But if appellants' position prevails, thousands of employees performing clearly secular tasks in secular enterprises will be subject to religious employment discrimination without the slightest First Amendment justification.

> To permit religious organizations to engage in religious discrimination in all of their secular, nonreligious activities would "withdraw Title VII's protection from employees at the hundreds of diverse organizations affiliated with [religious entities], including businesses which process food, sell insurance, invest in stocks and bonds, and run schools, hospitals, laboratories, rest homes and sanitariums."

594 F.Supp. at 820 (App. 57a-58a), *quoting Pacific Press Pub. Ass'n, supra*, 676 F.2d at 1280.

In *United States v. Lee*, this Court observed:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limit they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from the social security taxes to an employer operates to impose the employer's religious faith on the employees.

455 U.S. at 261. If the scope of the §702 exemption is unbounded, religious organizations will be encouraged to expand their "activities" further and further into the secular economy and impose their faith on thousands of

employees performing wholly secular tasks. Such consequences run afoul of the Establishment Clause.

f. The district court considered, without deciding, whether §702 violates the third prong of the *Lemon* test by excessively entangling the Government with religious organizations. *See* 594 F.Supp. at 826-28 (App. 70a-75a). It concluded that an analysis of the character and purpose of the institutions benefitted and the nature of the aid provided weighs in favor of the view that §702 excessively entangles the Government with religion. 594 F.Supp. at 827 (App. 72a-74a). Appellees believe that this analysis is correct and requires the conclusion that §702 is also unconstitutional under the entanglement prong of the *Lemon* test.

The §702 exemption is "a sure formula for concentrating and vastly extending the worldly influence of those religious sects having the wealth and inclination to buy up pieces of the secular economy." *King's Garden, Inc., supra,* 498 F.2d at 55. The Mormon Church is one such sect. As two observers of the Mormon Church recently have written:

> . . . [T]here is nothing "other worldly" about Mormonism in the ordinary sense of the term. As religion and as dynamic organization, it is dedicated to "this-worldly" change aimed at establishing a communally owned and operated business empire and a theocratically ruled, unified world society. For members of the Church of Jesus Christ of Latter-day Saints, the material aspects of human existence are raised to the same status as spiritual concerns, . . . Mormon historian Leonard J. Arrington has written:

> Among the Mormons, things temporal have always been important along with things eternal, for salvation in this world and the next is seen as one and the same continuing process of endless growth. Building Zion, a literal kingdom of God on earth, has therefore meant an identity of religious and economic values. . . .
>
> Thus, economic growth is an integral part of Mormon theology.

J. HEINERMAN & A. SHUPE, THE MORMON CORPORATE EMPIRE, 77 (1985).

This theology of economic growth has led the Mormon Church to acquire a "widely diversified and profitable conglomerate" in the communications field, including three television stations and twelve radio stations, extensive agribusiness and commercial real estate holdings, a group of insurance companies, and a large securities portfolio, *see. id.*, at 46-124, and to become one of the largest employers in Salt Lake City and the State of Utah. *Id.*, at 92.

The §702 exemption gives the institution at issue here, the Mormon Church, the power to extract economic contributions and require absolute religious loyalty and obedience from its large number of employees, even those engaged in the Church's extensive secular activities. The effect is plainly to encourage the further incursion by religions such as the Mormon Church into the secular economic realm. The nature of this aid to religious employers—the authority to coerce religious

loyalty through economic power in the secular realm —excessively entangles Church with State.[20]

3. The district court's conclusion that §702, as applied to Mayson, is unconstitutional, is consistent with the conclusion of the other lower courts which have considered the issue. *See King's Garden, Inc., supra; Feldstein, supra.* There is no conflict requiring resolution by this Court.

4. The district court properly weighed the equities in deciding that, notwithstanding the Corporations' reliance on the permissive exemption in §702, an award of backpay to Mayson was appropriate.[21] 618 F.Supp. at 1027-29 (App. 116a-119a). The court's award is fully consistent with Title VII's strong presumption in favor of backpay, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975, and its "make-whole" purpose. *Id.* Plenary review of the award by this Court is unwarranted.

---

[20] Religious organizations today seek to play an increasingly active and vocal role in the economic and political life of the Nation. Appellees do not in any way challenge their right to do so. The question, however, is whether religious groups, when they choose to interject themselves into the secular economic or political arenas, should be able to do so without being subject to important rules regulating participation in these secular realms.

[21] The Corporations did not oppose Mayson's request for reinstatement. *See* 618 F.Supp. at 1029 (App. 120a).

CONCLUSION

The motion to affirm should be granted.

October 14, 1986.

Respectfully submitted,

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Nos. 86-179 and 86-401

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and THE UNITED STATES OF AMERICA,

Appellants,

v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, David B. Watkiss, being sworn, state that on this ..... day of October, 1986, three copies of Appellees' Motion to Affirm in the above captioned case were mailed, in envelopes properly addressed and first class postage prepaid, to counsel of record for appellants herein and to the Solicitor General, and one copy to all other counsel herein, as follows:

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I further state that all parties required to be served have been served.

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SWORN TO before me this ..... day of October, 1986.

(5)

No. 86-179

Supreme Court, U.S.
FILED
OCT 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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Appellants,

UNITED STATES OF AMERICA,
Intervenor,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Utah

---

REPLY TO MOTION TO AFFIRM

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OCTOBER TERM, 1986

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UNITED STATES OF AMERICA,
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v.

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Appellees.

On Appeal from the United States District Court for the District of Utah

---

REPLY TO MOTION TO AFFIRM

The appellees' motion to affirm is devoted almost exclusively to a defense of the District Court's decision on the merits. While we disagree with those arguments, their validity is not the issue at this jurisdictional stage. The one conclusion that is eminently clear from the motion to affirm is that the merits are not only worthy of this Court's review, but review is virtually required.

The appellees necessarily contend in the motion to affirm that the holding below is so clearly correct that the Court does not need briefing and argument on the

merits. That argument fails for two reasons. The first is that this case falls within a narrow category of disputes which Congress itself has determined must be reveiewed by this Court. The second is that, in any event, the issues have far too broad an impact on the nation's churches, and are far too difficult, to leave the District Court's judgment unreviewed.

This case lies squarely within the jurisdiction created by 28 U.S.C. § 1252. Section 1252 contains a congressional determination that the normal course of appellate review—by the courts of appeals—should be bypassed where a District Court has held a federal statute unconstitutional in a proceeding to which the United States is a party. Indeed, Congress not only authorized Supreme Court review of such cases, it fully expected review to occur. For cases within its limited scope, § 1252 virtually eliminates the need for this Court to consider the usual factors in deciding whether to note jurisdiction. In cases such as this one, Congress itself has struck the relevant balance.

Moreover, under any standard, this appeal warrants full review on the merits, as the motion to dismiss implicitly recognizes.

The appellees do not contend, nor could they, that the issues are simple. The issues raised by this case not only lie at the intersection of the religion clauses of the First Amendment; they also involve competing values of the Establishment Clause itself. The respect that this Court has consistently shown to Congress and its policy-making prerogatives requires review of the District Court's judgment that an important federal statute is unconstitutional. This is particularly true where Congress has determined that no other appellate review is available.

The need for review by this Court is even stronger because this dispute involves more than competing constitutional considerations. It also involves the constitutionality

of a pivotal provision of Title VII, which represents Congress' conscientious effort, based on eight years of actual experience, to reach an appropriate accommodation of a difficult constitutional question. Congress' judgment in this respect is of course not determinative; it is the province and duty of this Court finally to determine what the Constitution means.

For reasons discussed in the Jurisdictional Statement and not answered by the appellees, Congress had only three realistic options.[1] The alternative eventually selected is the only one that does not raise serious constitutional questions. If, contrary to Congress' judgment (and, we submit, contrary to the Constitution itself), a vast range of Title VII cases involving religious employers is to be resolved by judicial inquiry into such matters as which beliefs and practices of this nation's churches qualify as genuinely religious, and whether church employment practices make a sufficient contribution to the achievement of religious objectives, such an obvious entanglement should not be permitted without careful consideration by this Court. We note in this regard that the appellees attempt to educate the Court concerning what they regard as basic precepts of Mormonism. They assert, for example, that the church believes there is no rigid separation between things temporal and things eternal. We agree that the approach shared by the District Court and the appellees requires courts to determine the content of Church doctrine, and whether its precepts are more closely linked to the operation of a welfare program than they are to the manufacture of religious garments or the operation of a gymnasium. That kind of endeavor is non-judicial, substantively fruitless, and squarely at odds with Establishment Clause values as consistently declared and protected by this Court. Yet it is precisely this problem that lies at the very heart of the District Court's holding and the appellees' argument.

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[1] See Jurisdictional Statement, p. 10, n.8.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
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No. 86-179 and No. 86-401

In The

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Intervenor,

v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Utah

BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENTS

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QUESTION PRESENTED

Whether Congressional amendment of the Civil Rights Act exempting the activities of religious organizations from the statutory prohibition against religious discrimination in employment is constitutional only as applied to religious activities; thus necessitating administrative and judicial determination regarding which activities of religious organizations are truly religious in nature?

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Other Authorities:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.*, § 702 ..... 3, 4, 6

No. 86-179 and No. 86-401

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UNITED STATES OF AMERICA,

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v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Utah

BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENTS*

In accordance with this Court's Rule 36, the General Conference of Seventh-day Adventists respectfully sub-

* Letters from all parties consenting to the filing of this Brief have been filed with the Clerk of this Court.

mits this Brief as Amicus Curiae in support of the jurisdictional statements filed by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints in Case No. 86-179 and by the United States of America in Case No. 86-401.

INTEREST OF AMICUS CURIAE

The world-wide governing body of the Seventh-day Adventist Church is the General Conference of Seventh-day Adventists, which is located in Washington, D.C. Because of the Church's strong doctrinal emphasis on healthful living, the ecclesiastical umbrella of the General Conference includes the Church's Department of Health and its world-wide health care system, which are jointly charged with the duty to disseminate the Church's beliefs regarding health and to administer to the health care needs of the world. Within the Adventist Health System in the United States there are approximately 150 hospitals, nursing homes and other health care organizations which collectively employ well over 50,000 employees.

Adventist Health System/United States is a nonprofit corporation organized by the Seventh-day Adventist Church to help carry forward the health message of the Church, "to make man whole." The Articles of Incorporation of the Adventist Health System/United States declare that the "specific purpose of this corporation is to preserve the mission of the Seventh-day Adventist Church as it pertains to its health ministry." The relationship between the Church's doctrine and its operation of health care institutions is set forth in the Church's Statement of Philosophy for Health Care Institutions and Services.

That Statement summarizes the Church's doctrines and principles regarding health care as follows:

> "In summary, the Adventist health-care institution is a corporate extension of Christ's life and mission and is the Seventh-day Adventist Church fulfilling its health and healing ministry. It is therefore indivisible from the church's total ministry in carrying the gospel to all the world."

In this context, the staffing of Seventh-day Adventist hospitals is of vital concern to the Church. The Statement of Philosophy evidences that concern. Although it affirms the Church's commitment to avoid discrimination on the basis of race, ethnic background, or sex, it firmly asserts the right to make employment decisions on the basis of religion:

> "The freedom to hire persons whose lives conform to this philosophy is fundamental to the achievement of the objectives of the Church."

Section 702 of the Civil Rights Act, as amended in 1972, confirms that freedom. Most importantly, it does so without resort to investigation and inquiry regarding the religious versus secular nature of the activity of a religious organization. Since the District Court below declared the exemption of Section 702 to be unconstitutional to the extent that it applies to secular activities of a religious organization, the Seventh-day Adventist Church and all of its health care institutions within the United States are intensely interested in the outcome of this litigation. Porter Memorial Hospital, a hospital within the Adventist Health System/United States, has particular interest in this case inasmuch as it is currently involved in litigation which addresses the same issue. *Porter Memorial Hospital v. United States of America, Equal Employment Opportunity Commission*, Civ. No. 86-A-1229, United States District Court for the District of Colorado (filed June 18, 1986).

THE QUESTION IS SUBSTANTIAL

The question presented in this case is substantial and must be reviewed by this Court. This Court's decision will have a far-reaching impact upon nearly every religious organization in this country. Prior to the 1972 Amendment of Title VII, the nation's churches operated under the cloud of threatened government investigation, interrogation, and prosecution arising out of employment policies and practices which furthered their religious objectives. That cloud was created by the limitation of the exemption for religious organizations to employment connected with "religious" activities. Thus, the Equal Employment Opportunity Commission was required to investigate, interrogate, and reach prosecution decisions which hinged upon a determination of the religious versus secular nature of activities of a religious organization. Similarly, the federal judiciary was required to adjudicate those sensitive questions of religious belief and activity. The cloud of government oversight of religious organizations undoubtedly had a chilling effect upon their willingness to exercise the "freedom to hire persons whose lives conform to [their] philosophy [which] is fundamental to the achievement of the objectives of the Church." *See,* Statement of Philosophy cited above.

The 1972 Amendment of Section 702 was a studied revision of the Act—studied in the laboratory of eight years' experience of government entanglement with religion. Both the clear import of congressional removal of the modifier "religious" preceding the term "activities" in Section 702 and the legislative history confirm the unmistakable intent of Congress to exempt religious organizations from scrutiny for religious discrimination in *all*

their activities. That amendment was necessary both to prevent government entanglement with religion and to permit the free exercise of religion.

By its decision below, the District Court has once again cast a cloud of uncertainty over the employment decisions of religious organizations. It has, once again, opened the door to government entanglement in religious issues. This Court has recognized the constitutional infirmity of a parallel situation. In *National Labor Relations Board v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979), the Court addressed a similar issue in the context of NLRB assertion of jurisdiction over schools associated with the Catholic Church. NLRB policy "was to decline jurisdiction over religiously sponsored organizations 'only when they are completely religious, not just religiously associated.'" *Id.* at 493 (citation omitted). Having found that the schools were merely religiously associated, the NLRB asserted jurisdiction. In that setting, this Court made "a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed." *Id.* at 502. In response to the Board's assertion that it could avoid entanglement since it would resolve only factual issues, this Court stated:

> "Moreover, it is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F2d, at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith

> of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.

Id.

The declaration in this case by the Court below that Section 702 is unconstitutional insofar as it applies to secular activities of religious organizations invites the same type of government entanglement in Civil Rights Act cases which this Court prevented in the handling of claims under the National Labor Relations Act. Neither the Equal Employment Opportunity Commission nor the federal courts should be involved in drawing the line between the religious and secular activities of a religious organization. Much less should either body be permitted to deny an exemption to a religious organization on the ground that an activity claimed to be religious is, in fact, merely secular in nature.

———o———

CONCLUSION

Congress carefully balanced the First Amendment considerations when it amended Section 702 in 1972. The Court below has upset that balance by declaring the amendment unconstitutional. The Court should note probable jurisdiction and restore the balance which was carefully fashioned by Congress.

OCTOBER 8, 1986.

Respectfully submitted,

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FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-179, 86-401

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On Appeals from the United States District Court for the District of Utah

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BRIEF FOR APPELLANTS IN NO. 86-179

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QUESTIONS PRESENTED

1. Whether Congress acted unconstitutionally when it amended Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, to permit religious employers to hire only members of their own faith, regardless of the nature of the employment activity, in order to make it unnecessary for the EEOC or federal courts to decide whether particular employment activities of religions are "religious" or "secular?"

2. Whether, when an Act of Congress is declared unconstitutional, a court may impose liability and award back pay against an employer who relied in good faith upon the plain language of the statute in setting conditions of employment?

PARTIES

In addition to the parties set forth in the caption, the following are parties to this action:

1. Plaintiffs

Judy Bawden	Arthur Frank Mayson
April Joyce Riding	Ruth Arriola
Deniece Kanon	Shelleen Adamson

Ralph L. Whitaker has no interest in this appeal because the district court determined that he was properly discharged from his employment. No final judgment against Mr. Whitaker has been entered.

2. Defendants

The Corporation of the President of The Church of Jesus Christ of Latter-day Saints*

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* A statement filed in compliance with Rule 28.1 is set forth at page iii of appellants' jurisdictional statement.

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BRIEF FOR APPELLANTS IN NO. 86-179

OPINIONS BELOW

The order and final judgment of the district court (J.S. App. 83a-87a) is unreported. The district court's memorandum decision and order granting in part appellees' motion for summary judgment (J.S. App. 88a-122a) is reported at 618 F. Supp. 1013. The district court's prior memorandum decision and order denying appellants' motion to dismiss (J.S. App. 1a-82a) is reported at 594 F. Supp. 791.

JURISDICTION

The final judgment of the district court was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on May 16, 1986. J.S. App. 86a. Notices of Appeal were timely filed in the district court by the Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints ("CPB") and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints ("COP") on June 9, 1986 (J.S. App. 130a), and by the United States on June 13, 1986. The CPB and the COP filed their jurisdictional statement on August 5, 1986, and the United States filed its jurisdictional statement on September 11, 1986 (No. 86-401). This Court has jurisdiction of these direct appeals under 28 U.S.C. § 1252. On November 4, 1986, this Court postponed determination of jurisdiction until consideration of the merits of these appeals.[1]

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[1] Under 28 U.S.C. § 1252, this Court has jurisdiction "from an interlocutory or final judgment . . . of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . is a party." *See California* v. *Grace Brethren Church*, 457 U.S. 393, 404 (1982). The district court in this case has declared Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, unconstitutional as applied to non-religious activities. J.S. App. 70a, 75a, 91a. *See United States* v. *Dorusmont*, 449 U.S. 292 (1981). The court has entered a final judgment for appellee Frank Mayson pursuant to Rule 54(b)

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the United States Constitution provides, in pertinent part that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides that it shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . .

Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, as amended, provides:

> This title shall not apply . . . to a religious corporaton, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

STATEMENT

The United States District Court for the District of Utah has invalidated a key provision of Title VII of the Civil Rights Act of 1964 ("Act"). As originally enacted

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of the Federal Rules of Civil Procedure. J.S. App. 86a. Under Rule 54(b), the district court is authorized to enter "final judgment as to one or more but fewer than all of the claims or parties [before it]," and final judgments under Rule 54(b) are ripe for appellate review as authorized by the United States Code. *See Sears, Roebuck and Co.* v. *Mackey*, 351 U.S. 427 (1956). Appeal under 28 U.S.C. § 1252 brings before this Court not merely the constitutional question decided below, but also any other issues finally decided. *See, e.g., United States* v. *Locke*, 105 S. Ct. 1785, 1791 (1985); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975).

in 1964, Section 702 of that Act provided that religious employers may restrict their employment to "individuals of a particular religion to perform work connected with . . . [their] *religious* activities . . ." (emphasis added). In 1972, Congress deleted the word "religious," thereby broadening the exemption to permit religious employers to hire "individuals of a particular religion" (*i.e.*, members of their own faith) with respect to all their activities. The district court declared that the 1972 amendment is "invalid as applied to secular non-religious activities . . ." because it was "a law respecting an establishment of religion" in violation of the First Amendment. J.S. App. 70a, 75a.

1. The Church of Jesus Christ of Latter-day Saints (the "Church"), sometimes called the Mormon or LDS Church, is an unincorporated religious association with membership and activities throughout much of the world. The ecclesiastical leader of the Church on earth is its President, who is recognized by Church members as a prophet and revelator chosen by Jesus Christ.[2] The President and his counselors constitute the First Presidency of the Church.[3] The First Presidency is assisted in administering the affairs of the Church by priesthood quorums and councils and the Presiding Bishopric.[4] The Presiding Bishopric is composed of the Presiding Bishop and two counselors.[5]

Appellants CPB and COP administer certain programs and activities of the Church. Under Utah law, the CPB is a corporation sole which incorporates the office of the Presiding Bishop and which holds title to a number of Church properties. The COP is also a corporation sole

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[2] Aff. of Dallin H. Oaks, Apostle of the Mormon Church, ¶ 3 (R. XIV at 202-03). References to the record will contain the volume number followed by the page number at which a document is located in the record.

[3] *Id.*

[4] *Id.* at ¶ 4.

[5] *Id.*

which incorporates the office of the President of the Church and which is the primary employing entity of the Church. Both the COP and the CPB are treated for federal and state income tax purposes as exempt, non-profit religious entities under Section 501(c)(3) of the Internal Revenue Code. The Church owns or controls some profit-making, tax-paying entities, which are *not* involved in this case and as to which the Church has not sought exemption from state or federal employment regulation.[6]

In its non-profit activities, the Church employs only its members who are eligible for a "temple recommend."[7] That policy arises from several Church beliefs. First, the Church believes that people judge it by the actions and attitudes of its employees. The "fact that an individual is employed by the Church signifies to others that his actions are condoned by the Church."[8] The Church also believes that "[a]ctive members of the Church [*i.e.*, those eligible for temple recommends] better understand and are more effective in carrying out the programs and purposes of the Church." Defendants' Supplemental Answers to Interrogatory Nos. 8 and 10, Plaintiffs' Third Set of Interrogatories (R. XI at 8-10, 16-19). Moreover, salaries paid to Church employees are obtained primarily from contributions from members of the Church donated to support Church activities. *Id.* The Church believes that it should benefit members with employment possibilities in which these contributed funds are expended. *Id.*

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[6] Aff. of Wayne Nelson, ¶ 6 (R. XIV at 199).

[7] The temple recommend is an annually renewed certificate which signifies that its possessor is a member of the Church and is eligible to enter the Church's temples, where certain sacred ceremonies are performed. Aff. of Dallin H. Oaks, ¶¶ 16-18 (R. XIV at 206-07). Because temple recommends are issued only to members who observe Church religious standards (such as regular church attendance, tithing, and abstinence from coffee, tea, alcohol and tobacco) (*id.*), they afford an administratively convenient means of identifying those who qualify for church employment.

[8] Aff. of John Russell Homer, ¶ 4 (R. XIV at 171).

Moreover, employment of the Church's own members is also consistent with the Church's doctrine of individual self-sufficiency. The Church believes that those who are able should work to support themselves rather than receive welfare. In 1936, the President of the Church, Heber J. Grant, stated:

> Our primary purpose was to set up, insofar as it might be possible, a system under which the curse of idleness would be done away with, the evils of a dole abolished, and independence, industry, thrift and self-respect be once more established among our people. The aim of the Church is to help people to help themselves. Work is to be reenthroned as the ruling principle of the lives of our Church membership.[9]

2. The Church activity which was the subject of the district court's final judgment involves Deseret Gymnasium ("Deseret").[10] Deseret is an unincorporated

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[9] Conference Report, October Conference of The Church of Jesus Christ of Latter-day Saints, 1936, p.3, quoted in Aff. of F. Earl Matheson, ¶ 9 (R. XIV at 179-180).

[10] Two other Church activities, Beehive Clothing Mills ("Beehive") and Deseret Industries ("Industries"), were also included in appellees' action. Beehive is an unincorporated, Church-owned, tax-exempt activity subsidized by the Church. Beehive manufactures required religious garments and ceremonial clothing used in the Church's temples. When a Church member makes certain of the covenants that can be entered into only in the temples of the Church, the member must be wearing temple garments and temple clothing. Aff. of Dallin H. Oaks, ¶¶ 12, 13 (R. XIV at 206). The Church regards these items as sacred. *Id.* at ¶ 14. The design, manufacture and distribution of the garments produced by Beehive are under the direct supervision of the leadership of the Church. The claims of those appellees formerly employed at Beehive have not yet been resolved bcause the district court found that disputed issues of fact precluded a determination on a motion for summary judgment as to whether Beehive is a "religious" or a "secular" activity and that additional discovery was required to resolve that question. J.S. App. 18a-19a, 93a-105a.

Industries is an unincorporated, tax-exempt and subsidized component of the Church's general welfare program. J.S. App. 104a-107a. It hires and trains unemployed, handicapped and retarded

Church-owned, non-profit and subsidized facility governed by a Board appointed by the First Presidency of the Church. J.S. App. 11a-12a. Board members are primarily ecclesiastical officers of the Church. Deseret has neither corporate nor financial existence separate from the COP and holds no bank accounts in its own name.[11] Its employees are hired through the Personnel Department of the Church. *Id.* The property on which Deseret is located is owned by the CPB and is exempt from real estate taxation by the State of Utah on the ground that the premises are used exclusively for religious and charitable purposes under Article 13, Section 2 of the Utah Constitution.[12] The Church, through Deseret, engages in charitable activities by making the facility available at no or at reduced cost to charitable groups and therapy patients.[13]

Deseret was founded to provide Church members with wholesome, church supervised exercise and recreation at facilities where the Church's moral and health standards are observed. The Church believes that one purpose of life on earth is to acquire a body which is the tabernacle of the spirit. *Pearl of Great Price*, Abraham 5:7 (R. XXVI at 42); *New Testament*, 2 Peter 1:13-15 (R. XXVI at 1551-52).[14] The body therefore must be re-

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members of the Church to, *inter alia*, refurbish and sell used items. The court granted summary judgment in favor of the COP and the CPB with respect to the claim of Ralph Whitaker, a former employee of Industries. The court concluded that Industries is a religious activity and thus that appellants may lawfully prefer Church members in employment at Industries. *Id.* at 105a.

[11] Aff. of Leon Heaps, ¶ 4 (R. I at 91).

[12] Aff. of Leon F. Olsen, ¶ 5 (R. I at 95). Those portions of the premises occupied by Deseret that are leased to franchisees which provide certain services to Deseret patrons are not tax exempt. *Id.*

[13] Aff. of Leon Heaps, ¶ 6 (R. I at 92).

[14] Church doctrine rests primarily on four volumes of scripture: a) the *Bible;* b) *The Book of Mormon;* c) *The Doctrine and Covenants;* and d) *The Pearl of Great Price.* Aff. of Dallin H. Oaks ¶ 8 (R. XIV at 204). The Church also recognizes the principle of

spected and cared for during this life. *Doctrine and Covenants*, 89 (R. XXVI at 175-76). At resurrection, the spirit and the body are to be reunited into a tangible body of flesh and bones, which constitutes the human soul. *Doctrine and Covenants*, 88: 14-15 (R. XXVI at 166).[15] Thus the human body acquired in this life has eternal spiritual significance.

The religious purpose of Deseret is reflected in the dedicatory prayer offered at the opening of the facility in 1910 (J.S. App. 13a-14a):

> "Our Father in Heaven, we are assembled for the purpose of dedicating . . . Deseret Gymnasium, as a place where Thy sons and daughters may come to obtain training and exercise beneficial to their physical condition, that their minds may be kept alert and their bodies fitted to the many duties and responsibilities which may be required of them in their daily occupations. Provision has been made for various kinds of exercise that will be suited to the needs of one and all, that will help to fit them for the various vicissitudes of mortal life. Skilled and faithful teachers will be provided so that all that is done by

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continuing revelation, particularly that Jesus Christ continues to reveal important matters pertaining to the doctrines, organization and administration of the Church. *Id.* at ¶ 9. Pronouncements in the nature of revelation given by the President of the Church become Church doctrine of significance equal to that of written scripture. *Id.* The President of the Church, as the designated spokesman of Jesus Christ on the earth, is the final interpreter of Church doctrine, both in interpretation of existing doctrine and in the introduction of new doctrine resulting from continuing revelation. *Id.* The content of revelations and other statements of policy and doctrine are issued from time to time by the First Presidency as public announcements, letters or other statements. *Id.*

[15] *See* B. McConkie, *Mormon Doctrine*, 750 (2d Ed. 1966):

> We had spirit bodies in pre-existence; these bodies are now housed temporarily in mortal tabernacles; during the period between death and the resurrection, we will continue to live as spirits; and finally spirit and body will be inseparably connected in the resurrection to form immortal or spiritual bodies.

way of activity will be conducted under proper direction and in keeping with the laws of physical health. Lessons in relation to the care of the body will be provided for all.

Moreover the day will begin with humble prayer and it is the intention that whatever is done by way of exercise . . . will be done in the spirit of prayer and obedience to Thy commandments.

* * *

[M]ay all who assemble here, and who come for the benefit of their health, and for physical blessings, feel that they are in a house dedicated to the Lord.

* * *

[M]oreover we pray that all who come may feel that the Spirit of the Lord is here, whether it be in athletic fields or in the gatherings which will come for religious purposes.[16]

3. Appellee Frank Mayson was employed at Deseret as a building engineer responsible for maintaining the facilities and supervising fourteen custodians and parking lot attendants. J.S. App. 17a. During a personnel

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[16] The religious purpose of Deseret was also described in an official publication of the Church at the time the facility first opened in 1910.

> The opening for physical examination and membership, September 1, of the Deseret Gymnasium marks a *new epoch in the progress of Church work.* The Church has always encouraged manly sports and legitimate enjoyments. It is a part of its *creed* that the most efficient Latter-day Saint is the one who is well balanced mentally, morally, and *physically.* In the city the chances for proper physical training are small. . . . *Hence, the authorities deemed it necessary to provide some means of securing for the young people a place where they could get this physical training, and that under the direction of our own people.* At the same time they thought to provide a means of legitimate enjoyment to the young people by encouraging athletic games and contests. (Emphasis added.)

The Improvement Era, Vol. 13, 1048 (Sept. 1910), quoted in Supplemental Answer to Interrogatory No. 15, Plaintiffs' Third Set of Interrogatories (R. XI at 26-28).

review in 1980, Mr. Mayson, who had not maintained eligibility for a temple recommend, was offered a period of time to regain eligibility. Alternatively, he was offered early retirement if he were unwilling to meet church standards. Second Amended Complaint ¶¶ 36, 38 (R. III at 117-18). Mr. Mayson declined both options, and thus was discharged on April 10, 1981. J.S. App. 3a-4a, 17a, 119a.

4. Mr. Mayson and four other individuals, who were terminated from jobs at Beehive because they did not maintain eligibility for a temple recommend, filed suit against the CPB and the COP in the United States District Court for the District of Utah on April 4, 1983. Plaintiffs claimed that their discharges for failure to qualify for a temple recommend constituted employment discrimination on the basis of religion in violation of Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and a parallel provision of Utah law, Utah Code Ann. § 34-35-6(1).

The CPB and the COP moved to dismiss the complaint, relying on the exemption for religious institutions contained in Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1. In a decision issued January 11, 1984, the district court concluded that, as amended in 1972, Section 702 applies to *all* church employment, religious and non-religious (J.S. App. 25a). But, applying the three part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the district court held that the 1972 amendment was an unconstitutional establishment of religion because, as applied to employment in "non-religious" activities, the exemption had the "effect" of advancing religion. J.S. App. 20a-75a.[17]

The district court then developed its own three-part test for determining whether an activity conducted by a religious organization is "religious" or "secular." J.S.

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[17] The court indicated that its "determination regarding [Section 702] applies with equal force to the [parallel] state [law] exemption as it relates to the facts of this case." J.S. App. 8a.

App. 10a-11a. First, the court evaluated the tie between the religious organization and the activity at issue with regard to areas such as financial affairs, day-to-day operations and management. J.S. App. 10a. Second, the court held that "whether or not there is a close and substantial tie between the [religious organization and the activity at issue], the court must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration." J.A. App. 10a. Third, the court held that where "the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent, the court must engage in a third inquiry. It must consider the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization or matters of church administration." J.S. App. 11a. Applying this new test, the court concluded that Deseret is not a religious activity of the Church.[18]

Appellees then amended their complaint to add a new plaintiff who had been employed at Industries. They

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[18] In declining to dismiss the claims of former Beehive employees, the district court stated:

> Among other areas, the court thinks that plaintiffs are entitled to conduct discovery in the following areas: (1) the manufacturing of garments prior to 1960 and any subsequent changes; (2) the distribution of garments prior to 1960 and any subsequent changes; (3) the tax exempt status of Beehive; (4) the past and current employees who were or are non-members of the Mormon Church; (5) Beehive's contracts, both past and current, with private commercial enterprises for the production of garments; and (6) current hiring practices of the defendants' garment and temple clothing manufacturing plants in Mexico and England. Until those areas and others have been fully developed, the court cannot rule on whether this case, as it relates to Beehive, involves religious activities.

J.S. 18a-19a.

conducted extensive discovery into the organization and beliefs of the Church and the Church's operations of Deseret, Beehive and Industries. Thus, for example, appellees filed interrogatories asking:

> —For a complete description of the worldwide organization of the Church including details of each division, subsidiary, or affiliates' organization and operations since January 1980.
>
> —For detailed job descriptions and religious affiliation data of each and every worker in every division, subsidiary or affiliate of the Church, worldwide including religious qualifications and details thereof for each job.
>
> —For the name of every person who had applied for or was dismissed from any such position in the Church for a period of over three years and the details of all hiring and dismissal decisions.
>
> —For extensive information regarding domestic and worldwide production of garments at any time, including organizational, operational, financial and personnel data.

First Set of Interrogatories, Nos. 2-6, 11-17 (R. III at 172; 175-79, 184-89).[19]

On September 18, 1985, acting on the appellees' motion for summary judgment, the district court reaffirmed its holding that Section 702 is unconstitutional as applied to "secular" activities. J.S. App. 116a. The district court awarded back wages, fringe benefits, retirement contributions and reinstatement to Mr. Mayson. *Id.* at 116a-120a. The district court denied summary judgment with respect to Beehive, stating that it needed further information about any past hiring of non-members or ineligible members at Beehive and about the Church's foreign garment manufacture and supply. *Id.* at 101a-105a. The district court, however, granted summary

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[19] Prior to production of information responsive to the foregoing requests, appellees "limited" their demands to information concerning Deseret, Beehive and Industries.

judgment for appellants with regard to Industries, which it concluded was sufficiently "religious" to pass the court's test for a religious activity. *Id.* at 116a. On May 16, 1986, after the United States had intervened pursuant to 28 U.S.C. § 2403, in order to defend the constitutionality of Section 702, the district court entered an order and judgment reaffirming its earlier decisions and granting a separate final judgment for Mr. Mayson under Rule 54(b). J.S. App. 83a-87a.

SUMMARY OF ARGUMENT

I.

This case involves a special, discrete class of Establishment Clause issues: the validity of an express governmental exemption relieving religious institutions from certain general obligations of law. In 1972, Congress amended Section 702 of Title VII of the Civil Rights Act of 1964 to exempt all religious preference hiring by religious institutions from the prohibition against employment discrimination based on religion. Thus, Congress made a conscientious effort, based on eight years of experience, to resolve the serious constitutional problems that otherwise would have existed because of Congress' own legislation. In so doing, Congress explicitly sought *both* to promote Free Exercise Clause values of religious autonomy *and* to avoid Establishment Clause problems of excessive government entanglement with religion. Congress concluded that the 1964 version of Section 702, which required the Equal Employment Opportunities Commission ("EEOC") and the courts to draw a line between exempted "religious" activities and non-exempted "secular" activities of religious institutions, was constitutionally untenable. Accordingly, Congress allowed religious institutions to engage in religious preference hiring across the whole range of their activities, just as they had been allowed to do for the first 175 years of our nation's history.

Congress' solution to the very real problems it faced falls well within the permissible scope of its constitu-

tional authority to make law. The district court's holding that Congress lacked this power is wrong for three reasons.

A. Congress acted within its constitutional bounds in 1972 because it secured rights guranteed by the Free Exercise Clause. As applied in this case, the district court's three-part test for determining whether an activity is religious violates appellants' free exercise rights. The court improperly ignored appellants' claims that religious preference hiring in this case served religious purposes which are based on and are consistent with religious tenets of the Mormon Church. See *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1972). The court also authorized extensive governmental interference with, and surveillance of, Church activities which infringe appellants' right to autonomy protected by the Free Exercise Clause. See *NLRB* v. *Catholic Bishop*, 440 U.S.C. 492 (1979). No compelling governmental interest justifies these court-imposed infringements because Congress itself decided to exempt religious preference hiring from the prohibition against discrimination based on religion. The district court lacked any authority to create its own governmental interest which was not legislated by Congress. Because the conduct subject to the district court's final judgment is protected by the Free Exercise Clause, it cannot be an establishment of religion. Thus the validity of Section 702 under the Establishment Clause is not drawn into question in this case. See *Zorach* v. *Clausen*, 343 U.S. 306 (1952); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).

B. Section 702's general exemption for religious preference hiring is constitutional under the Establishment Clause analysis of this Court's leading express exemption cases—*Walz* v. *Tax Commission*, 397 U.S. 664 (1970), and *Gillette* v. *United States*, 401 U.S. 437 (1971). This Court made clear in *Walz* that the limits of permissible state accommodation of religion are by no means co-extensive with the non-interference mandate of the Free Exercise Clause.

This Court also recognized in *Walz* and *Gillette* that rigid application of an "effects" test is not appropriate when evaluating the constitutionality of an express exemption under the Establishment Clause because either exemption or non-exemption will have the effect of advancing or inhibiting religion. Thus, the district court erred because *Walz* and *Gillette*, not *Lemon* v. *Kurtzman*, *supra*, provide the appropriate framework for evaluating Section 702. Under *Walz* and *Gillette*, courts should inquire, first, whether the government acted with a legitimate, secular purpose and, second, whether the exemption at issue involves less governmental entanglement with religion than the alternatives to that exemption. Under this approach, Section 702 is clearly constitutional. It was enacted with the legitimate, secular purpose of promoting free exercise values and avoiding Establishment Clause problems. Moreover, it is demonstrably less entangling than the district court's elaborate three part test for distinguishing the "religious" activities of a religious institution from its "secular" activities.

C. Even if *Lemon* provides the applicable Establishment Clause standard of review, the district court misapplied the "primary" effects test and therefore incorrectly declared Section 702 unconstitutional. Section 702 authorizes *no* active cooperation between the government and religion, provides *no* subsidy to church activities and makes *no* effort to coerce religious beliefs. Its primary effect is to protect the autonomy of religious doctrines and church functions, which is not impermissible under *Lemon*. Alternatively, the district court erred by focusing only on whether the exemption, in and of itself, "advances" religion and ignoring whether a more limited exemption "hinders" religion within the meaning of *Lemon*. Under a more discerning "effects" analysis appropriate to cases involving express exemptions, any limited effect in advancing religion that Section 702 has is clearly outweighed by the district court's approach which significantly hinders religion. Thus, on balance, Section 702 does not have an impermissible effect and is therefore constitutional.

II.

Even if Section 702 is unconstitutional, the district court erred in imposing liability and awarding back pay when appellants reasonably relied upon the clear language of Section 702 in making their employment decisions. Denial of back pay in this case is supported by 42 U.S.C. § 2000e-12(b), which immunizes employers who rely upon EEOC opinions even if they are later determined to be unlawful. Congress thus clearly evinced an intent to protect good faith actions such as appellants'. Moreover, denial of back pay is supported by this Court's decisions holding that retroactive relief is inappropriate under Title VII if it would unduly upset settled expectations of employers. See, *e.g.*, *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U.S. 1073 (1983).

ARGUMENT

I. CONGRESS' DECISION TO EXEMPT RELIGIOUS INSTITUTIONS FROM TITLE VII's PROHIBITION AGAINST RELIGION-BASED DISCRIMINATION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

In deciding how a prohibition against employment discrimination based on religion should be applied to religious preference hiring[20] by religious institutions,[21] Congress had three broad alternatives from which to choose:

(1) It could prohibit all religious preference hiring by religious institutions;

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[20] Throughout this brief, the phrase "religious preference hiring" will be used as shorthand for the activity expressly exempted by Section 702 as amended: "the employment of individuals of a particular religion to perform work connected with the carrying on by [a religious institution] of its activities."

[21] The actual language of Section 702 exempts a "religious corporation, association, educational institution or society." Throughout this brief, the phrase "religious institutions" will refer to the various types of religious entities exempted by Section 702.

(2) It could prohibit all religious preference hiring by religious institutions with respect to "secular" activities and exempt all religious preference hiring by religious institutions with respect to "relgious" activities, as it did in the 1964 version of Section 702; or

(3) It could exempt all religious preference hiring by religious institutions, as it did in the 1972 Amendment of Section 702, thus returning to the state of federal law as it had existed prior to the passage of the Civil Rights Act of 1964.[22]

The real thrust of appellees' complaint is that the line drawn by Congress in amending Section 702 in 1972 was underinclusive because Congress did not go as far as it might have in prohibiting religious preference hiring by religious institutions. Congress simply determined that the line it had attempted to draw in 1964 between "religious" and "secular" activities of religious institutions was constitutionally untenable. See pp. 26-29, *infra*.[23] Accordingly, it decided to return to the status quo ante, which had existed for the first 175 years of this nation, by allowing religious institutions to engage in religious preference hiring across the whole range of their activities. Thus, appellees, and other parties like them, were in no different position in 1972 after Section 702 was amended than they were before Title VII was enacted. While this brief will demonstrate that Section

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[22] Title VII also prohibits religious (and other) institutions and employers from discriminating in employment on the basis of race, color, sex or national origin. None of these other prohibitions against employment discrimination is at issue in this case.

[23] The House version of the 1964 Civil Rights Act contained a blanket exemption for all hiring by religious institutions based on the "particular religion" of an individual. *Legislative History of Titles VII and XI of the Civil Rights Act of 1964* at 3004 ["1964 History"]. The Senate substitute inserted the limitation of the exemption to the "religious activities" of religious institutions. *Id.* at 3004. Senators Humphrey and Dirksen noted the change, but did not explain why it had occurred or what considerations motivated it. *Id.* at 3004, 3017.

702 as amended is constitutional under the Religion Clauses of the First Amendment, it is worth noting at the outset that appellees' claim of underinclusiveness—that Congress did not go as far as appellees would like in defining the scope of Title VII—may also be seen as a equal protection issue.[24] And Congress' choice in 1972 clearly satisfies the constitutional requirements of the Equal Protection Clause as applied to the Federal government. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). See note 40, *infra*.

A. Congress' Exemption In Title VII As Applied In This Case Secures Rights Protected Under The Free Exercise Clause And Is Therefore Constitutional.

1. At issue in this case is Congress' discretion to alleviate serious free exercise concerns that would otherwise exist because of Congress' own legislation, without running afoul of the prohibition against establishing religion. In *Wallace* v. *Jaffree*, 105 S. Ct. 2479, 2504 (1985) (concurring opinion), Justice O'Connor succinctly described the accommodation problem presented here as follows: "[t]he challenge posed by [religious accommodation] is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion."

One bedrock principle for solving this problem is that government clearly can legislatively authorize any conduct which the Free Exercise Clause would compel the

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[24] In *Crawford* v. *Board of Educ. of City of Los Angeles*, 458 U.S. 527 (1982), this Court held that the Constitution is not violated when a state first requires mandatory busing to achieve racial balance in the public schools—though under no federal constitutional obligation to do so—and then later rescinds that obligation through amendment to its state constitution. Here, as in *Crawford*, the Constitution, under either an Equal Protection or Religion Clause analysis, does not preclude the appropriate governmental policymakers from exercising less than the total measure of anti-discrimination authority arguably available to them or from establishing an initial threshold of anti-discrimination protection and then receding from that threshold in order to avoid governmental interference with religion.

government to leave unregulated. *Zorach* v. *Clauson*, 343 U.S. 306, 312-314 (1952); *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970). Thus, government respect for free exercise *rights* cannot constitute an establishment of religion. See *Quick Bear* v. *Leupp*, 210 U.S. 50, 82 (1908); *School District of Abingdon Township* v. *Schempp*, 374 U.S. 203, 296-297 (Brennan, J., concurring) (1963); *Sherbert* v. *Verner*, 374 U.S. 398, 415-416 (1963) (Stewart, J., concurring). Accordingly, a narrow basis for reversing the judgment below is to hold that the Free Exercise Clause protects the conduct of the Church which was interfered with by the district court's final judgment. In that event, the constitutionality of Section 702 under the Establishment Clause is not drawn into question.

The district court held that its application of Title VII did not infringe appellants' free exercise rights because "[p]reventing religious discrimination . . . can have no significant impact on the exercise of 'any sincerely held religious belief' of the Mormon Church." J.S. App. 54a, quoting *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277, 286 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982). But this conclusion is premised on an unduly expansive interpretation of the district court's authority to interpret religious doctrine and an unduly narrow interpretation of the Free Exercise Clause's protection of religious beliefs and of the Church as an institution.

2. The basic inquiry under the Free Exercise Clause is straightforward—the Court must decide whether the fundamental right has been infringed or burdened and, if so, whether there is a compelling governmental interest that justifies the infringement. *United States* v. *Lee*, 455 U.S. 252, 257 (1982); *Thomas* v. *Review Board*, 450 U.S. 707, 717-718 (1981). In this case the district court has substituted its judgment for that of the Church in deciding whether the Church's practices concerning employment generally, and the operation of Deseret in particular, "substantially" serve the Church's religious objectives.

The Church's employment policies stem from its belief that active members—those eligble for temple recommends—better understand and are more effective in carrying out the programs and purposes of the Church. See p. 4, *supra*. Employment of the Church's own members is also consistent with the Church's doctrine of individual self-sufficiency. In addition, some of the money used to pay the salaries of employees comes directly from contributions by members of the Mormon Church. In spite of church policy, the district court has ordered the church to use its monies to pay salaries of those who do not meet its standards. See p. 11, *supra*. With respect to Deseret itself, the activities pursued there are consistent with basic Mormon principles concerning the eternal significance of the human body. See pp. 5-8, *supra*.

The district court simply ignored the uncontradicted evidence which demonstrated that valid religious beliefs are served directly by the Church's religious preference hiring. In applying its contrived three-part test for determining which activities of the Church are "religious" or "secular," the court substituted itself for the Church. This was manifestly inconsistent with this Court's decisions interpreting the Free Exercise Clause which make clear that the activities of the Church based on the tenets of Mormon faith cannot be set aside or ignored by a secular court. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972); *Jones* v. *Wolf*, 443 U.S. 515, 605 (1979). Matters of faith and doctrine are committed to the exclusive control of the church and, absent evidence of sham or insincerity, are entitled to absolute respect by the courts. This Court has stated plainly that under the Free Exercise Clause "[c]ourts are not arbiters of scriptural interpretation." *Thomas* v. *Review Board*, 450 U.S. at 716. It is therefore inappropriate for a court to require religious institutions to "be put to the proof of their religious doctrines or beliefs." *United States* v. *Ballard*, 322 U.S. 78, 86 (1944).

In other cases, which often involve competing claims of religious organizations to church property, this Court

has adopted clear rules of deference to the church's own decisions about church doctrine and the allocation of church authority. See *Kedroff* v. *Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 100, 107-108, 115-116, 119-121 (1952). As the Court held in *Kedroff*, the First Amendment embodies "a spirit of freedom of religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Accord *Jones* v. *Wolf*, 443 U.S. at 605; *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 721-722 (1976).

There is no question that the religious doctrines of the Mormon Church which were undermined by the district court's opinion are genuinely held, and that the practices are consistent with the Church's religious beliefs. Therefore, it was absolutely beyond the province of the district court to pass judgment upon whether they were sufficiently "religious." By so doing, the Court infringed appellants' First Amendment rights.[25]

The district court through its application of its three-part test in this case has infringed not only the Church's right to decide how to operate in conformity with church doctrine, but also upon its right, protected under the Free Exercise Clause, to operate free of undue government interference and surveillance. The detailed, burdensome discovery requests—some initiated by appellees and some by the district court *sua sponte*, J.S. App. 18a-19a, 93a-105a—permits unseemly, governmentally-authorized

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[25] The district court erred in disregarding these principles on the basis of cases such as *Southwestern Baptist Theological Seminary, supra*, which involved claims of *racial* discrimination. The courts in those cases found that nothing in the religious tenets authorized racial discrimination. But it cannot be disputed that the Mormon church does have an institutional, religious preference for employing its own members. Interference with that preference constitutes an infringement of the Church's right of free exercise.

surveillance and scrutiny of Mormon Church beliefs and practices by private plaintiffs, and perhaps, in a subsequent case even by the EEOC itself. This is plainly the type of "invasion . . . by civil authority" which the First Amendment was adopted to protect against. *School District of Abingdon Township* v. *Schempp*, 374 U.S. at 222. This judicially-authorized, on-going surveillance of religious institutions as part of the processes of litigation is directly analogous to the surveillance which has concerned this Court in other contexts. See, *e.g.*, *Lemon* v. *Kurtzman*, 403 U.S. 602, 615-620 (1971); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. at 501-504.[26]

The district court's application of Title VII thus clearly intrude upon the free exercise rights of religious institutions and their need to operate free of excessive governmental interference. See, *e.g.*, *Kedroff*, *supra*, 344 U.S. at 107-108; *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449-51 (1969); *Maryland & Va. Eldership of the Churches of God*, 396 U.S. 367, 368-70 (1970) (Brennan, J., concurring). One commentator has argued correctly that these cases recognize an essential "right of autonomy" under the Free Exercise Clause which "logically extends to all aspects of church operations." Laycock, *Towards a General Theory of the Religion Clauses: The Case of*

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[26] Claims involving excessive entanglement of church and state often are analyzed under the Establishment Clause. *See* pp. 29-34, *infra*. *See also Lemon* v. *Kurtzman*, 403 U.S. at 612-613; *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 105 S. Ct. 1953, 1963-1964 (1985). But, entanglement is not an issue relevant only to Establishment Clause claims. Governmental regulation or surveillance can interfere with the free exercise of religion as the Court recognized in *Kedroff*, 344 U.S. 94, 100, 107-108, 115-116, 119-121 and in *Catholic Bishop*, 440 U.S. at 501-504. The fact that the two Clauses operate in harmony on the issue of entanglement—*i.e.*, both evince a clear preference for non-entanglement—provides a compelling argument for analyzing express exemption cases on the basis of which alternative express exemption involves the least amount of governmental entanglement or interference with religion. *See* pp. 29-38, *infra*.

Church Labor Relations and the Right to Church Autonomy, 81 Column. L. Rev. 1373, 1397 (1981). To force the Church's otherwise autonomous operations to be scrutinized in the fashion authorized by the district court thus infringes appellants' free exercise rights as defined by this Court.

3. Of course, not every infringement of the free exercise of religion violates the Constitution. The question remains whether the government can properly assert a compelling interest to justify the infringement and show that the infringing action was carefully tailored to that governmental interest. See, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. at 717-718. It is in this regard that the district court committed its most glaring error.

The district court justified its intrusion into appellants' religious practices on the basis that "an exemption from Title VII for discrimination in secular, non-religious activities would seriously undermine *Congress*' attempt to eliminate discrimination." J.S. App. 57a (emphasis added). The district court's compelling interest analysis thus treats the issue as if Congress itself had limited the religious exemption in Title VII to "religious" activities and that appellants are challenging the limitation as a violation of the Free Exercise Clause. In that event, the court quite reasonably would examine the importance of Congress' desire to eliminate employment discrimination based on religion, just as the lower courts have done in race and sex discrimination cases. But what the district court's analysis simply ignores is that Congress has made *its own* judgment that the public interest will be better served by allowing religious preference hiring by religious institutions in all their activities. That was why it amended Section 702 in 1972. The district court had no basis in precedent or logic for creating a compelling interest to eliminate religious discrimination where the Congress itself had found none. As one commentator has correctly explained:

> The 'compelling state interest' element of the free exercise test is for the protection of the government

> defendant; it is in the nature of an affirmative defense. If the government does not choose to invoke it, no other party has cause to complain.[27]

Accordingly, the district court erred in holding that its blatant infringement of appellants' free exercise rights could be justified by any governmental interest the court itself might concoct. Once it is established that the district court's application of Title VII violates the Free Exercise Clause, it then becomes clear that Congress' attempt in Section 702 to protect free exercise rights cannot be an establishment of religion as applied in this case.

B. Under This Court's Decisions in *Walz* v. *Tax Commission* and *Gillette* v. *United States*, Section 702 Is A Permissible Accommodation Of Religious Activities Which Minimizes Governmental Entanglements And Therefore Does Not Offend The Establishment Clause.

Alternatively, Section 702's exemption for religious preference hiring is constitutional under the proper Establishment Clause analysis. This Court has made clear that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." [28] The decisions of this Court recognize that "the interrelationship of the Religion Clauses has permitted government to take religion into account . . . and to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel* v. *Paty*,

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[27] McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 31.

[28] *Walz* v. *Tax Commission*, 397 U.S. at 673. See *Gillette* v. *United States*, 401 U.S. 437, 453 (1971); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Wallace* v. *Jaffree*, 105 S. Ct. at 2504 (O'Connor, J., concurring); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) (accomodation is constitutional "even when the government is not compelled to do so by the Free Exercise Clause").

435 U.S. 618, 639 (1978) (Brennan, J., concurring) (footnotes omitted). See *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952); *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908).

The issue remains, however, of defining a legitimate area of accommodation, while at the same time ensuring that the Establishment Clause is not eviscerated by legislative efforts to promote religious freedom. The district court rigidly applied the three-part analysis in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which is most readily utilized to evaluate efforts by the states to provide financial aid or other direct forms of assistance to religion or religious institutions. See, *e.g.*, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973); *Aguilar* v. *Felton*, 105 S. Ct. 3232 (1985).

The analysis in *Lemon* was not fashioned to deal with the discrete and special category of Establishment Clause issues presented when government has expressly chosen not to provide religion with financial aid or with other direct assistance, but instead to accommodate religious freedom and autonomy by exempting religious institutions from certain obligations of law. In particular, rigid application of *Lemon*'s "effects" test is inappropriate because, as this Court has recognized, the "effect" of such exemptions will, inevitably, be to advance religion—just as the decision not to accord an exemption will, inevitably, inhibit religion. *Walz* v. *Tax Commission*, 397 U.S. at 674-675; *id.* at 692 (Brennan, J., concurring). Thus, while *Lemon* obviously remains an approach this Court has found useful for Establishment Clause issues relating to governmental aid to religion, it is not well-suited to the task of defining the limits of appropriate accommodation in the unique setting of governmentally enacted exemptions.[29]

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[29] This court has recognized that direct governmental benefits to or burdens on religion raise more difficult constitutional questions than express governmental exemptions. *Walz*, *supra*, 397 U.S. at 673, 676 & 690 (Brennan, J., concurring).

Indeed, in mechanically applying *Lemon*'s "effects" test, and in voiding Section 702 simply because it has the "effect" of providing some benefit to all religious institutions, the district court improperly ignored this Court's warning in *Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984), that in "our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." This Court has thus emphasized the need for careful, case-by-case analysis (*id.* at 679):

> In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. *Lemon, supra. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.* [Initial emphasis in original; subsequent emphasis supplied.]

The Court's admonition in *Lynch* echoed this Court's earlier statement that *Lemon*'s three part analysis "provides 'no more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges." *Mueller* v. *Allen*, 463 U.S. 388, 394 (1983), quoting *Hunt* v. *McNair*, 413 734, 741 (1973).[30]

In an Establishment Clause case involving an express attempt by Congress to accommodate free exercise of religion by providing an exemption from general obligations, courts should first determine whether the gov-

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[30] *See also School Dist. of City of Grand Rapids* v. *Ball*, 105 S. Ct. 3216, 3222 (1985) (*Lemon* tests "'must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired'"), *quoting, Meek* v. *Pittenger*, 421 U.S. 349, 359 (1975).

ernment acted with a legitimate, secular purpose. If so, then courts should apply the Establishment Clause analysis of the leading express exemption cases, *Walz* v. *Tax Commission*, and *Gillette* v. *United States*, 401 U.S. 437 (1971), and not examine whether an "effect" of the exemption is to promote or inhibit religion, but rather ask whether the exemption involves less governmental entanglement than the alternatives to that exemption. That analysis will permit accommodation of religion, but only when the exemption promotes both Free Exercise and Establishment Clause values by respecting religious autonomy.

1. Section 702, As Amended in 1972, Has A Valid, Secular Purpose.

The clear objective of the 1972 Amendment to Section 702 was to return the federal law to its pre-1964 state by eliminating governmental involvement in the religious preference hiring of religious institutions across the full range of their activities. This conclusion is apparent from the face of the amended Section 702 itself; the limiting word "religious" was deleted, thus exempting religious preference hiring with respect to all "activities" of religious institutions.[31]

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[31] The 1972 amendment to Section 702 had its origins in a Senate bill, and two sponsors of the amendment, Senators Allen and Ervin, and its main opponent, Senator Williams, clearly indicated that the objective of the amendment was to delete the word "religious" from the exemption embodied in the 1964 version of Section 702 in order to remove government involvement in all religious preference hiring. See, *e.g.*, *Legislative History of the Equal Employment Opportunity Act of 1972*, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess. 843-845 (1972) (hereafter "Legislative History") (remarks of Sen. Allen), 1645 (remarks of Sen. Ervin), 1665 (remarks of Sen. Williams). The conference committee accepted the Senate Amendment and explained that it expanded the exemption for religious organizations "in all their activities instead of the present limitation to religious activities." *Id.* at 1814. See also *id.* at 1858-1859 (Statement of Rep. Erlenborn).

The rationale for the 1972 amendment of Section 702 was demonstrably secular. As even the district court recognized, the sponsors of the amendment, especially Senator Ervin, made clear that the sole reason for the amendment was to comply with *both* the Religion Clauses of the First Amendment. First, Senator Ervin was deeply and correctly concerned that the 1964 exemption impaired the free exercise of religion. Senator Ervin explained, "this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be." Legislative History at 1645. As he further stated with respect to a similar but broader amendment [32]:

> I cannot understand why the EEOC [Equal Employment Opportunities Commission] or those who support it are so anxious to extend its powers so that it will have jurisdiction over who is employed by a church to be a janitor, or who is employed to be a secretary for a church, or who is employed—as is done in many instances where religious organizations have fundraising drives—to raise money for them.

Legislative History at 1223.

A second purpose of the amendment was to avoid the entanglement between church and state forbidden by both the Free Exercise and Establishment Clauses by taking government out of the business of drawing the line between "secular" and "religious" activities in order to regulate the former under, and exempt the latter from, Title VII's prohibition against religion-based discrimination. During the debate on his broad amendment, which excluded religious institutions from any of Title VII's strictures, Senator Ervin stated with respect to the 1964 version of Section 702:

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[32] Before advancing the amendment to Section 702 which was ultimately enacted, Senator Ervin urged enactment of an amendment which would have exempted religious institutions from all the prohibitions of Title VII. Although this broader amendment did not become law, the concerns which motivated Senator Ervin were clearly the same with respect to both the broader amendment and the amended version of Section 702 which was ultimately enacted. J.S. App. 35a.

> Mr. President, as I construe those words, they attempt to do an impossible thing, that is, to separate the religious activities of a religious corporation, association, educational institution, or society, from those of its activities which can be said to be not religious, nonreligious, or unreligious.

Legislative History at 1211. Senator Ervin also said:

> . . . [T]he clause against the establishment of religion by law was intended to erect a wall of separation between church and state. I respectfully submit that we do not erect a wall of separation between church and state when we permit the agents of the state to tell . . . [a religious institution] whom it is to employ for any purpose, or whom it is to promote for any purpose, or whom it may discharge for any reason.

Id. at 1221.

In sum, it is clear that Congress' intent in amending Section 702 was to remove government from religious preference hiring decisions by religious institutions in order to promote constitutional values and to avoid constitutional problems. This is clearly a valid secular purpose. See *Wallace* v. *Jaffree*, 105 S.Ct. at 2490; *id.* at 2494-2495 (Powell, J., concurring), *id.* at 2501 (O'Connor, J., concurring). In so doing, the Congress did not intend to benefit any particular religion; it sought to preserve the autonomy of all religions and to keep government out of decision-making by religious institutions. It also acted with the express intent of following the commands of *both* of the Constitution's Religion Clauses. Congress thereby promoted religion in a way that directly advances a secular interest in pluralism. See *Walz* v. *Tax Commission*, 397 U.S. at 687, 689 (Brennan, J., concurring); *Bob Jones University* v. *United States*, 461 U.S. 574, 609 (1983) (Powell, J., concurring). Congress' intent was thus valid under the decisions of this Court. *Gillette* v. *United States*, 401 U.S. at 453-54. See also J.S. App. 40a-41a. As the district court noted, there is no evidence that Congress "amended

Section 702 for a religious purpose or to promote religion or religious beliefs". *Id.*

2. The *Walz-Gillette* Analysis of Express Exemptions.

If, as in this case, an express exemption has a valid, secular purpose, this Court has not utilized the three part test in *Lemon*, but, instead, has limited its inquiry to whether the exemption involves less governmental entanglement with religion than the alternatives. Under this approach, Section 702 is clearly constitutional.

a. The leading case involving an Establishment Clause challenge to an express exemption of religion is *Walz* v. *Tax Commission*. In that case, this Court upheld the constitutionality of a New York State constitutional provision, implemented by state statute, that authorized the state tax commission to grant property tax exemptions to property used exclusively for religious, educational or charitable purposes. 397 U.S. at 680. After finding that the purpose of the tax exemption was valid (*id.* at 672), the Court analyzed whether the exemption involved less governmental entanglement with religion than the alternative—no exemption from property taxes for holdings of religious institutions. *Id.* at 674-75. In answering the second question, the Court stated:

> In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. *Id.* at 675.

Accordingly, the key inquiry under *Walz* involves a *comparison of the alternatives on the issue of the relative entanglement of government with religion.* This analysis makes sense in an accommodation case because both the Free Exercise Clause and the Establishment Clause condemn the excessive entanglement of church and state. See pp. 20-22 & n.26, *supra*. In addition, it is difficult to hold that Congress is "sponsoring" religion when its ac-

tion merely effects a more complete separation of church and state.

Although *Walz* was decided before *Lemon*, the Court nonetheless recognized that, in assessing the constitutionality of an exemption under the Establishment Clause, it was not useful to determine whether the exemption, considered in isolation, advanced or inhibited religion. The Court noted that either "course, taxation of churches or exemption, occasions some degree of involvement with religion." *Id.* at 674. As Justice Brennan stated succinctly in his concurring opinion (*id.* at 692), whether "Government grants or withholds the exemptions, it is going to be involved with religion."

In other words, either an exemption, a subsidy or taxation will have a significant inhibiting or advancing effect with respect to religion, and thus a general inquiry into whether the single alternate chosen, in and of itself, excessively inhibits or advances religion would lead to the anomalous result that no alternative was constitutional. Thus, the proper inquiry is whether an exemption involves less entanglement with government than the alternatives. *Id.* at 690-91 (Brennan, J., concurring).[33]

b. The basic approach of *Walz* was followed in *Gillette* v. *United States*, which, unlike *Walz*, involved an exemption that applied *only* to religion (and not to educational or charitable activities). Section 6(j) of the Military Selective Service Act of 1967 exempted from military service in the armed forces a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war *in any form*." 401 U.S. at 441 (emphasis supplied). Petitioners, who sought exemption from military service, claimed that Section 6(j) impermissibly established religion because it exempted

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[33] Although *Walz* does, in one place, mention the need to examine the "effect" of an exemption (*id.* at 669), the analysis employed by the Court shows that the only effect considered relevant was the comparative entanglement of the alternatives. The "effect" of the exemption—in the broad *Lemon* sense of advancing or inhibiting religion—was not an issue analyzed by the Court in *Walz*.

those who opposed participation in *all* wars based on beliefs which were religious in nature but did not exempt those who opposed participation in *particular* wars due to religious beliefs. Just as in *Walz*, this Court recognized that the exemption had the inevitable *effect* of advancing religion—those with religious beliefs opposing all wars as opposed to those with religious beliefs opposing particular wars. As the Court stated (*id.* at 449):

> On the assumption that these petitioners' beliefs concerning war have roots that are "religious" in nature . . . petitioners ask how their claims to relief from military service can be permitted to fail, while other "religious" claims are upheld by the Act. It is a fact that § 6(j), properly construed, has this *effect*. Yet we cannot conclude in mechanical fashion, or at all, that the section works an establishment of religion. [Emphasis supplied.] [34]

Thus, as in *Walz*, a conclusion that the exemption had the effect of advancing religious interests was not dispositive—indeed was not deemed relevant. This Court instead inquired whether the statutory exemption had a secular purpose and rationale and whether the exemption would be more or less entangling than the alternative urged by petitioners. *Id.* at 449, n.14 & 450. Although the Court indicated (but did not hold) that the Free Exercise Clause did not require that Congress exempt conscientious objectors from military service, *id.* at 461, n.23, it had no trouble finding a secular purpose in Congress' evident intent to promote "free exercise values." *Id.* at 453-54.

The Court then concluded that the "petitioners ask for greater 'entanglement' by judicial expansion of the ex-

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[34] The Court did not even pause over the exemption's obvious effect of benefiting certain individuals with religious beliefs, as compared to those without such beliefs, by relieving conscientious objectors of a grave obligation of citizenship—bearing arms for the nation. *Id.* at 450. *See Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

emption to cover objectors to particular wars." *Id.* at 450. As the Court stated (*id.* at 457-458):

> It does not bespeak an establishing of religion for Congress to forgo the enterprise of distinguishing those whose dissent [to particular wars] has some conscientious basis from those who simply dissent [from the particular war] . . . . [I]t is true that "the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the greater the potential for state involvement" in determining the character of persons' beliefs and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious. *Walz* v. *Tax Commission*, 397 U.S. at 698-699 (opinion of Harlan, J.).[35]

The greater potential for entanglement raised by petitioners' claim to an exemption for particular wars, as compared to the statutory exemption for conscientious objection to all wars, was thus a dispositive consideration in upholding Section 6(j) against the Establishment Clause challenge.

c. The *Walz-Gillette* approach to express exemptions was recently followed by this Court in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983). Bob Jones University contended that the denial of tax exemption to private schools with racially discriminatory admissions policies violated the Establishment Clause by preferring religions which do not require racial discrimination over

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[35] The Court in *Gillette* thus found that the more broadly worded exemption decreased the likelihood that the federal statute would be enforced in a discriminatory fashion. 401 U.S. at 457-458. This concern applies equally in this case. Any effort by the courts to define what activities are "religious" and which are not will almost certainly lead to inconsistent decisions. Thus, by requiring such an inquiry, the district court has increased significantly the likelihood that similar activities will be exempt for some religious institutions but not for others. Such a consequence is directly contrary to the purpose of the Religion Clauses. *See Walz* v. *Tax Commission*, 397 U.S. at 698-699 (opinion of Harlan, J.); *Gillette* v. *United States*, 401 U.S. at 457.

those which believe racial intermixing is forbidden. In rejecting this Establishment Clause challenge to the scope of the tax exemption, this Court did not even refer to the *Lemon* test. Nor did it consider the effect of the limited exemption relevant because there could be little doubt that the effect was, in fact, to advance religious institutions with racially non-discriminatory religious beliefs and practices over religious institutions with racially discriminatory beliefs and practices. *Id.* at 603-604 (denial of tax exemption would "inevitably have a substantial impact" on operations of segregated schools). Instead, citing *Gillette* and following the *Walz-Gillette* approach, this Court simply found that the exemption had a secular purpose—the strong national policy favoring elimination of racial discrimination—and that the present exemption avoids the necessity for a *potentially* entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief. 461 U.S. at 604, n.30.

d. Support for the *Walz-Gillette* Establishment Clause analysis of exemptions for religious institutions is also found in this Court's decisions construing statutes to avoid constitutional problems arising from the Religion Clause guarantees. In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court held that, as a matter of statutory construction, schools operated by a church to teach both religious and secular subjects were outside the jurisdiction of the National Labor Relations Act ("NLRA"). See also *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 788 (1981).

Crucial to the Court's analysis was the determination that there would be a serious risk of infringement of the Religion Clauses of the First Amendment if the Act conferred jurisdiction on the NLRB over church-operated schools. 440 U.S. at 501-504. But, in concluding that non-NLRA coverage (*i.e.*, effective exemption) of church-operated schools would minimize the risk of a constitutional violation, this Court was not concerned that the *effect* of such non-coverage would be to benefit church-operated schools as compared to non-church-operated

schools. As in *Walz* and *Gillette*, therefore, the Court's concern in evaluating whether religious institutions should be exempt from laws of general applicability, was *not* with the *effect* of such an exemption but rather with the comparative degree of entanglement of the alternatives.

3. Section 702 Is Clearly the Least Entangling Approach Available And Therefore Is Constitutional Under the Establishment Clause Analysis Of *Walz-Gillette*.

As noted above, Congress had three available options for dealing with the religious preference hiring issue. See pp. 15-16, *supra* (describing the three options available to the Congress). One of those—a prohibition on all religious preference hiring by religious institutions—may be summarily eliminated from consideration. Because that option would authorize direct governmental regulation of religious preference hiring for core religious activities, such as who shall be members of the ministry or priesthood, it unquestionably would have been both a free exercise violation and an unconstitutional establishment of religion, as even the district court recognized. See J.S. App. at 48a-49a. See also *McClure* v. *Salvation Army*, 460 F.2d 553, 558-560 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *Gonzalez* v. *Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929); *McDaniel* v. *Paty*, 453 U.S. 618 (1978).

A comparison of the remaining two alternatives—the complete exemption of Section 702 or the district court's elaborate test for distinguishing between exempt "religious" activities and non-exempt "secular" activities of religious institutions (J.S. App. 10a-11a)—overwhelmingly demonstrates that Section 702 involves far less entanglement of government with religion.

First, the district court's alternative entails extensive and intrusive *investigation* of church doctrines, beliefs, practices and operations as compared with a complete absence of investigation under Section 702. As previously

discussed, see pp. 20-22, *supra*, the district court's test, by making religious doctrines and practices relevant to the proper disposition of a Title VII action, permits governmentally authorized surveillance of religious institutions by private or governmental plaintiffs. Such surveillance can be sustained over a substantial period while litigation proceeds, as this case again illustrates. See *Lemon*, 403 U.S. at 615-620; *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. at 502 ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions").[36]

Second, the application of the "religious" test to the "facts found" would also require *an independent administrative or judicial determination of the religious nature of the religious institution's beliefs and practices.* Thus, under the district court's test, the EEOC or a court will inquire whether the relationship "between the primary function of the activity in question and the religious rituals or tenets of the religious organization" is "substantial." J.S. App. 10a. This determination by a secular authority thrusts the EEOC and courts into the "potentially entangling inquiry" about the nature and strength of a religious institution's beliefs. *Bob Jones University* v. *United States*, 461 U.S. at 604-605 n.30; *Gillette* v. *United States*, 401 U.S. at 457 (recognizing the danger in detailed line drawing of "unintended religious discrimination"); *United States* v. *Lee*, 455 U.S. 252, 257 (1982) (judicial deference to religion's view of its own faith).[37] See also, *New York* v. *Cathedral Academy* 434

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[36] *See* the discussion in the Brief *Amicus Curiae* submitted by the General Conference of Seventh-Day Adventists concerning that Church's experience with EEOC investigations into the Church's employment of its own members in its hospitals.

[37] A similar objection applies to the third "prong" of the district court's test: consideration of the "substantiality" of "the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization . . ." J.S. App. at 11a.

U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.").

Third, in contrast to an exemption or some indirect method of regulation, the district court's approach would, if liability were established, lead to *direct regulation of the practices of the religious institution* through reinstatement or back pay remedies. Moreover, depending on the nature of the suit, such governmental regulation could not only be direct but also *continuing* if, as is often the case in Title VII suits, the court retained jurisdiction over the action to ensure that the remedy were effected. This continuing jurisdiction of the Court during the remedy stage of a proceeding could create the type of entangling surveillance disapproved by *Lemon* and *Catholic Bishop*. See p. 35, *supra*. These problems of entanglement are also avoided by the Congressionally mandated exemption of Section 702.

Fourth, the uncertainty created by the complex, multifactor test which entangles courts in evaluating the doctrines, beliefs, practices and operations of religious institutions will cause extraordinary uncertainty about whom religious organizations may hire in jobs that those organizations believe are "religious." This overall impact of entanglement will chill religious institutions in the exercise of their constitutional rights because they can be expected to err on the side of caution to avoid the rigors and scrutiny of litigation, not to mention potential liability.

The district court thus erred by not following the analysis mandated by *Walz-Gillette* of comparing the relative entanglement of the alternatives. See J.S. App. 44a-52a. Indeed, the district court, while initially acknowledging the relevance and force of *Gillette*, then proceeded to ignore it. *Id.* at 45a, n.41. Instead, the court summarily (and erroneously) asserted—without any analysis, let alone comparative analysis—that its test did not involve

"excessive" court surveillance of religion, would not require independent court determinations about religious doctrine and would not impermissibly involve the court in matters of church administration. *Id.* at 44a-45a.[38]

The primary reason the district court rejected appellants' claim of general entanglement in denying their motion to dismiss was that the courts of appeals (but not this Court) had, in Title VII actions involving charges of racial or sexual discrimination against religious institutions, asked whether the job was like a "minister's," and thus necessarily exempt from Title VII's prohibition under the Free Exercise Clause. J.S. App. 48a-51a. But the district court's reasoning is seriously flawed. In the sex and race cases, Congress had issued a blanket prohibition against employment discrimination; line drawing to exempt core religious functions from that prohibition was compelled by the Free Exercise Clause, and thus could not constitute impermissible entanglement under the Establishment Clause. But it simply does not follow—when Congress, by contrast, has chosen to exempt religious preference hiring completely from a prohibition against employment discrimination based on religion—that the district court's elaborate test drawing a line between "religious" and "secular" activities, imposed on its own policy initiative, does not constitute impermissible entanglement of government with religion.[39] The district court itself recognized that religious preference hiring by religious institutions is different from sex or race conscious hiring, noting (J.S. App. 51a) that the "area of religious discrimination may be more sensitive than the area of sex or race discrimination because the type of discrimination involved

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[38] These summary conclusions were subsequently contradicted by the district court's own analysis. J.S. App. 72a.

[39] Indeed, the district court acknowledged that the cases it relied upon were primarily Free Exercise challenges to the broad sweep of Title VII's prohibition against race and sex discrimination. J.S. App. 40a and n.35.

is intimately connected with the nature and purpose of religious organizations."

Congress itself ultimately acted on the view that religious discrimination by religious institutions may be "more sensitive" than race or sex discrimination by those groups when it amended Section 702 in 1972 and rejected Senator Ervin's broader amendments which would have exempted religious institutions from Title VII's prohibition against race and sex discrimination. See pp. 26-29, *supra*. Congress sought to remove the EEOC and the Courts from the entangling enterprise of drawing a line between "religious" and "secular" activities. In so doing, it commendably followed an accommodationist approach which promoted both Free Exercise Clause values of religious autonomy and Establishment Clause values of anti-entanglement. The *Walz-Gillette* approach properly permits government to pursue such goals and therefore, under *Walz-Gillette*, Section 702 does not violate the Establishment Clause.[40]

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[40] Because appellees are essentially arguing that Section 702, as amended, is underinclusive, this case might be analyzed under Equal Protection Clause principles applicable to the Federal government rather than under the Religion Clauses. Indeed, members of this Court have, at times, approached cases involving religion using principles from, or analogous to, equal protection analysis. *See, e.g., McDaniel*, 435 U.S. at 643 (White, J., concurring); *Fowler* v. *Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring).

Section 702, as amended, is constitutional under heigntened Equal Protection scrutiny, which is strikingly similar to the *Walz-Gillette* analysis. Section 702 has a compelling purpose (to promote Free Exercise values while avoiding Establishment Claus problems) and, for the reasons stated above, it is the least restrictive alternative for accomplishing that goal compared to the two other options available to Congress. See pp. 29-34, *supra*. Section 702 is also carefully tailored to the problem of religious preference hiring because Congress rejected Senator Ervin's broader amendment in 1972 that would have exempted religious institutions from Title VII's prohibition against employment discrimination based on race, sex, color or national origin.

C. Even If The *Lemon* Test Is Applied, Section 702 Does Not Violate The Establishment Clause.

Even if Section 702 is evaluated under the standards announced in *Lemon*, it is clear that the provision is permissible under the Establishment Clause. This Court in *Lemon* "gleaned" three tests from the Court's prior cases:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S at 612-613 (citations omitted). These "tests" are designed, and should be interpreted, to protect against the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support and active involvement of the sovereign in religious activity.'" *Id.* at 612, quoting, *Walz* v. *Tax Commission*, 397 U.S. at 668.

For reasons discussed above (at pp. 26-28, 34-38), the 1972 amendment to Section 702 plainly passes the first and the third *Lemon* tests. Thus, the only remaining question in applying *Lemon* in this case is whether the "principal or primary effect" of Section 702 is to advance or inhibit religion.

1. The district court inexplicably ignored what it had found to be the secular purpose of the statute in evaluating Section 702's effect, and concluded that the statute had the primary effect of advancing religion. But, the district court was wrong; the "principal or primary effect" of the statute is to eliminate government interference with religious institutions. The instant case involves *no* active cooperation between government and religion, *no* government subsidy to church activities and *no* attempt by the government to coerce religious beliefs. This Court never has found an improper "effect" of advancing religion with so little government action. Section 702 does nothing more than give churches the option

of deciding whether to use religious preferences in hiring. Thus, the primary "effect" on religious organizations resulting from Section 702 is increased autonomy—the ability to manage church affairs without government interference.[41]

Moreover, none of the factors cited by the district court justifies a contrary conclusion. First, in support of its conclusion that Section 702 impermissibly advances religion, the district court noted that the provision contains a facial religious classification that provides a benefit solely to religion, rather than to a broader spectrum of groups. J.S. App. 61a-66a. However, this Court has never held that a governmental action which affects only religion automatically offends the Establishment

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[41] Indeed, this Court has upheld, against Establishment Clause challenges, statutes providing far greater and more direct aid to religion that any "benefit" conferred under Section 702. *See, e.g., Walz, supra* (tax exemptions for religious organizations); *Mueller* v. *Allen*, 463 U.S. 388 (1983) (tax deductions for expenses incurred in sending children to parochial schools); *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736 (1976) (non-categorical grants to church-sponsored colleges and universities); *Hunt* v. *McNair*, 413 U.S. 734 (1973) (state assistance to sectarian colleges through the issuance of revenue bonds); *Board of Education* v. *Allen*, 392 U.S. 236 (1968) (laws requiring that public school districts purchase and loan textbooks to students in parochial schools); *Tilton* v. *Richardson*, 403 U.S. 672 (1971) (state grants to church-related colleges and universities for the construction of academic facilities); *Gillette, supra* (draft exemptions for religious objectors); and *Everson* v. *Board of Education*, 330 U.S. 1 (1947) (reimbursement to parents of children attending religious school for bus fare).

Moreover, this Court has ruled that the Free Exercise Clause *requires* the provision of religious facilities in prisons at state expense, *Cruz* v. *Beto*, 405 U.S. 319 (1972), as well as the religious exceptions to unemployment compensation laws in *Sherbert* v. *Verner, supra*, and *Thomas* v. *Review Board, supra*. In the instant case, Congress simply chose not to regulate certain decisions of religious organizations. In doing so, it did not endorse religion as such, did not endorse any particular faith and took nothing resembling the affirmative steps with regard to religion that this Court *approved* in *Cruz, Sherbert* and *Thomas*.

Clause. To the contrary, this Court upheld an express exemption solely for conscientious religious objectors in *Gillette*, although the Court indicated that the exemption was not required by the Free Exercise Clause. See also *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Quite clearly, if such a facial classification were sufficient to condemn a law, *no* exemption for religious practice would survive—not even an exemption for core religious activity of a church.

Second, the district court erroneously cited the absence of a historical tradition supporting the exemption. J.S. App. 66-67. For the first 175 years of our Nation's history, religious institutions could engage in religious preference hiring without implicating any federal anti-discrimination statute. Moreover, this Court has never held that historical traditions are dispositive of Religion Clause issues. See *McDaniel* v. *Paty*, 435 U.S. at 625 (clear history of discrimination against clergy holding public office not dispositive).

Third, the district court cited the possibility that the 1972 exemption might be used by a church to coerce adherence to its religious beliefs. J.S. 67a-68a, 72a-73a. However, the district court itself recognized that this concern is "purely hypothetical" conceding that "there is no evidence in this case that defendants are using or ever would use section 702 to further [their] beliefs." *Id.* at 73a n. 69. This Court has made clear it will not overturn legislative action on the speculative and unsupported assertion that it may lead to an impermissible result. *Larson* v. *Valente*, 456 U.S. 228, 249 (1982).

2. Even if the Court were to hold that, when evaluated alone, Section 702 has a primary effect of advancing religion, it still should not conclude on that basis that the provision is unconstitutional. In a case such as this, where the purpose of the exemption is to lessen the effect that governmental actions will have on religious institutions, the Court should compare the alternative approaches available to decide which approach pro-

duces "effects" which are least likely to advance *or hinder* religion. The district court found that the exemption in Section 702 advanced religion, but it disregarded the fact that its redefined exemption for "religious" activities will seriously hinder religion by interfering with church beliefs and doctrines and religious autonomy. Thus, the district court ignored the language in *Lemon* prohibiting primary effects which inhibit religion. If the district court had paid equal respect to all facets of *Lemon*'s effects test, it would have attempted to analyze the degree to which the broader exemption in Section 702 "advances" religion and compared that to the hindrance of religion caused by an exemption limited to "religious" activities.[42] Only in that way could the court properly determine whether the primary effect of Congress' action was to advance or hinder religion. Under that standard, Section 702 does not offend the Establishment Clause.

Appellants' previous analyses have largely explained the basis for the argument here. First, it is clear that the "effect" of the exemption on religion, even if it "primarily advances" religion, is very limited. See pp. 39-41, *supra*. By contrast, the amount of government entanglement and interference with Mormon religious beliefs and practices under the district court's analysis is substantial. See pp. 34-37, *supra*. While it is true that the Court has eschewed balancing tests under the Establishment Clause in cases involving direct government aid to religious institutions, such an approach would seem to be self-defeating here. The purpose of the effects inquiry is to determine whether a law enacted

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[42] In the context of this case, the "hindrance" of religion test and the "entanglement" test in *Lemon* overlap substantially. Thus, the comparison can be stated alternatively as being between the advancement of religion produced by granting a complete exemption of religious activities and the governmental entanglement created by providing a limited religious exemption. Under either label the ultimate inquiry remains which approach best serves the underlying purposes of the Establishment Clause.

by Congress tends to establish religion. If one facet of the *Lemon* test would be seriously violated by striking down a statute under a wooden application of another portion, the ultimate result will not promote religious freedom.

When a comparison between an exemption and a non-exemption leads to equipoise, or near equipoise, then, at least in a situation such as this one, where the legislature is genuinely seeking to advance constitutional values, deference to the legislative judgment as to how to proceed is appropriate. See *Gillette* v. *United States*, 401 U.S. at 460. Accordingly, in this unique situation, the Court should permit a limited comparative analysis in order to advance the purpose of the First Amendment.[43] If it does, then Section 702 is clearly constitutional.

II. THE DISTRICT COURT ERRED IN AWARDING BACK PAY AGAINST A CHURCH EMPLOYER THAT RELIED ON THE CLEAR LANGUAGE OF CONGRESS.

Even if, contrary to our submission in Part I, Section 702 is unconstitutional, the district court's award of back pay—and, indeed, its finding of any liability in this case—was nevertheless improper. Appellant's good faith reliance on the clear language of the Section 702 exemption should preclude an award of back pay against appellants. This conclusion is strongly supported by Congress' express determination that "no person shall be subject to

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[43] The Court in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 783-785 n.39 (1973), held that there is no room for a comparative analysis of secular effects and religious effects of a statute which advances religon. But that inquiry, which the Court described as a "metaphysical judgment" because of the disparate nature of the things being compared, is fundamentally different from the one proposed here. Nothing in the Establishment Clause requires the Court to give preeminence to effects which promote religion and ignore those which hinder it or to favor the primary effects prong of *Lemon* if to do so will undermine equally important values embodied in the entanglement prong. Some comparison is clearly required.

any liability or punishment for or on account of . . . an unlawful employment practice . . . [undertaken] in conformity with and in reliance on any written interpretation or opinion of the [EEOC] . . . notwithstanding that . . . such interpretation or opinion is . . . determined by judicial authority to be invalid or of no legal effect . . . ." 42 U.S.C. § 2000e-12(b). Thus, Congress plainly evinced its intent to preclude the imposition of "any liability or punishment" under Title VII on any person who in good faith implemented an employment practice in reliance on a regulation or opinion of the EEOC. It follows, *a fortiori*, that Congress did not intend back pay to be awarded against a party which in good faith relied upon the clear language of a statutory exemption enacted by the Congress itself.

The district court, in a two sentence footnote, held this provision to be of no relevance here because appellants did not rely upon a written opinion of the EEOC. The court's cavalier disregard of Congress' intent leads to a patently absurd result. The court implicitly assumes that Congress intended to give more weight to the EEOC's interpretation of Title VII than to the language Congress itself used in enacting that statute. Had any of the appellees ever challenged the Church's employment practices before the EEOC, the Commission would have been bound by Section 702 to deny all relief, and the Church would—without question—now be free of any liability for its policy of hiring only those persons who are eligible for temple recommends. Congress simply could not have intended to permit an award of back pay against a party that implemented an employment practice in good faith reliance on a Congressional exemption.

Equitable relief, including back pay, is authorized—although not mandatory—under Title VII, 42 U.S.C. § 2000e-5(g). The district court acknowledged that "legislative acts are presumed to be constitutional" (J.S. App. 118a), that appellants were wholly "justified in relying on the section 702 exemption" (*id.* at 118a n. 17),

and that "denial of back pay in this instance would probably not frustrate the central statutory purpose of eradicating discrimination throughout the economy" (*id.* at 119a). Notwithstanding these findings, the district court, relying primarily on this Court's decision in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), awarded Mr. Mayson back pay. J.S. App. 116a-120a. The court held that a denial of such relief would "frustrate the Act's purpose of making Frank Mayson whole for his injuries incurred through Deseret's past discrimination." J.S. App. 119a.

The district court abused its discretion in awarding back pay. This Court has made clear in at least two decisions that the statutory goal of making persons whole for injuries suffered from unlawful employment discrimination does not necessarily control the decision whether equitable relief is appropriate.

In *City of Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978), this Court considered a pension plan that was alleged to have violated Title VII. The plan called for female employees to make greater contributions than male employees. In holding that the pension plan violated Title VII, this Court refused to apply its decision retroactively. The Court noted:

> [a]lthough we now have no doubt about the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful. The courts had been silent on the question, and the administrative agencies had conflicting views.

435 U.S. at 719-720.

Similarly, in *Arizona Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U.S. 1073 (1983) (per curiam), this Court

considered whether *Manhart* should apply to discriminatory pension plans made available by an employer and run by outside companies. The Court ruled that this practice was illegal under *Manhart*, but again applied its decision prospectively only, holding that the benefits to be received from contributions made to the plans prior to *Manhart* may be calculated on the basis of the old standards. *Id.*[44]

In at least one significant respect, the case here for denial of retroactive relief is even stronger than in either *Manhart* or *Arizona Governing Committee*. The Church not only "may well have assumed" its employment policies complied with Title VII, *Manhart*, 435 U.S. at 720, but, indeed, implemented a practice *clearly permitted* by that Act. In sum, it was an abuse of discretion for the district court to hold that imposition of liability for back pay would serve Congress' "purposes" in enacting Title VII, when Congress itself clearly stated that the Act should not apply to the circumstances of this case.

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[44] The considerations that motivated the Court to apply its holding prospectively in *Manhart* also motivated the Court in *Arizona Governing Committee*. *See* 463 U.S. at 1106 (since *Manhart* did not apply to purchases on the open market, "an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market") (opinion of Powell, J.).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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January 5, 1987

Supreme Court, U.S.
FILED
JAN 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-179 and 86-401

In the Supreme Court of the United States

OCTOBER TERM, 1986

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, ET AL., APPELLANTS

v.

CHRISTINE J. AMOS, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE J. AMOS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, which exempts all activities conducted by religious organizations from the statutory prohibition against discrimination in employment on the basis of religion, is invalid under the Establishment Clause of the First Amendment to the extent that it exempts the secular activities of such organizations from the prohibition against religious discrimination.

PARTIES TO THE PROCEEDING

The parties to this proceeding are identified in the jurisdictional statement filed by the private appellants in this case, *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints* v. *Amos*, No. 86-179 (at ii).

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order and final judgment of the district court (J.S. App. 83a-87a) is unreported.[1] The prior opinion of the district court granting in part appellees' motion for summary judgment (J.S. App. 88a-122a) is reported at 618 F. Supp. 1013. The prior opinion of the district court denying the private appellants' motion to dismiss (J.S. App. 1a-82a) is reported at 594 F. Supp. 791.

JURISDICTION

The judgment of the district court was entered on May 16, 1986. The private appellants filed a notice of appeal to this Court on June 9, 1986 (J.S. App. 130a), and their appeal was docketed on August 4, 1986. The United States filed a notice of appeal to this Court on June 13, 1986 (86-401 J.S. App. 1a-2a). On August 6, 1986, Justice White issued an order extending the time within which to docket the government's appeal to and including September 11, 1986, and the appeal was docketed on that date. On November 3, 1986, this Court issued an order consolidating the two cases and postponing further consideration of the question of jurisdiction until the hearing of the cases on the merits. The jurisdiction of this Court rests upon 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution provides in pertinent part:

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[1] "J.S. App." refers to the appendix to the jurisdictional statement filed by the private appellants, *Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints* v. *Amos*, No. 86-179.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

2. Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, provides:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

STATEMENT

1. The Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints (CPB) and the Corporation of the President of The Church of Jesus Christ of Latter-day Saints (COP), conduct a variety of activities on behalf of The Church of Jesus Christ of Latter-day Saints.[2] One of these activities is the operation of the Deseret Gymnasium, a recreational facility located in Salt Lake City, Utah, that is open to the general public and is used for physical exercise and athletic games. The gymnasium was constructed on property owned by the CPB with funds supplied by the COP. Moreover, the gymnasium has no independent financial existence; purchases and hiring for the gymnasium

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[2] The CPB and the COP are corporations organized under Utah law (J.S. App. 2a-3a). They are under the direct control of the Church's religious leaders. See Affidavit of Dallin H. Oaks, dated April 12, 1985, at 2-3; Affidavit of J. Richard Clarke, dated April 12, 1985, at 2-3.

are conducted under the auspices of the COP, and the COP absorbs the gymnasium's operating losses. Finally, with the exception of the portion of the gymnasium leased to outside franchisees, the gymnasium is exempt from real estate taxes on the ground that the premises are used exclusively for charitable and religious purposes. J.S. App. 2a-4a, 11a-15a, 94a; Affidavit of Leon Heaps, dated June 10, 1983, at 2; Affidavit of Leon F. Olsen, dated June 12, 1983, at 3; Supplemental Answers to Plaintiffs' Third Set of Interrogatories at 28, 35.

The operation of the gymnasium also is tied to the Church. The gymnasium's governing board is appointed by the Church's religious leadership and is composed of church officials. Although the work of the gymnasium's employees is not part of the Church's worship or ritual, the purpose of the gymnasium is to provide a place at which Church members and other persons "may participate in athletic activities in an atmosphere expressive of [the Church's] moral and health standards." Supplemental Answers to Plaintiffs' Third Set of Interrogatories at 27-28; see also Heaps Affidavit at 2. The Church makes the gymnasium's facilities available to charitable and social organizations as part of the charitable service that is a "primary tenet" of its religious doctrine. Supplemental Answers to Plaintiffs' Third Set of Interrogatories at 28; see also Heaps Affidavit at 3.

Under the Church's doctrine, "[t]he most sacred ceremonies * * * are performed in Temples. Unlike the Church chapels and meetinghouses, which are used for public worship on the Sabbath and for Church activities throughout the week, Temples are open only to certain eligible members of the Church" (Affidavit of Dallin H. Oaks, dated April 12, 1985,

at 5). A member's eligibility to enter a Temple is documented by a card called a "temple recommend." To obtain a temple recommend, the member is interviewed by Church officials "to determine whether [he] sustain[s] the leadership of the Church and [is] living according to Church doctrine and standards" (*id.* at 7). The requirements for obtaining a temple recommend thus include observance of dietary laws, attendance at religious ceremonies, and tithing to the Church of one tenth or more of the member's income.

The record indicates that since 1969 the Church's policy regarding employment at several Church-owned activities—including the Deseret Gymnasium—has been governed by the following considerations:

a. Employees of the Church are expected to uphold the standards of the Church both on and off the job.

b. Many people judge the Church by the actions and attitudes of one of its employees. The mere fact that an individual is employed by the Church signifies to others that his actions are condoned by the Church. Therefore, off-the-job standards reflect greatly on the Church's reputation.

c. Continued employment in the Church is dependent on the employees living their lives so as to be worthy of a temple recommend.

Affidavit of John Russell Homer, dated April 12, 1985, at 3.[3] Among the reasons for this employment

[3] There have been isolated exceptions to this policy in connection with gymnasium employees, such as one occasion on which a Church member could not be found with the requisite

policy are that "[s]alaries paid Church employees are obtained primarily from contributions from members of the Church donated to support Church activities. The Church believes that it should benefit members with employment possibilities in which those contributed funds are expended"; and that "[t]he eligible member's belief in the doctrines and tenets of the * * * Church develops a special commitment to the inspired leadership of the * * * Church and gives all * * * Church activities the advantage of a committed, loyal work force." Supplemental Answers to Plaintiffs' Third Set of Interrogatories at 18-19.[4]

Appellee Frank Mayson was employed at the Deseret Gymnasium as an engineer responsible for maintaining the building's physical plant. In 1980, the Church initiated a review of its employees to determine whether its personnel policy was being followed. Mayson states that the director of the gymnasium informed him that he had not qualified for a temple recommend because he was not attending church services regularly or contributing his tithing to the Church and that he would lose his job unless he qualified for a temple recommend within six months.

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skills. Supplemental Answers to Plaintiffs' Third Set of Interrogatories at 18; see also Affidavit of Robert Borchert, dated April 12, 1985, at 2 (non-Church member hired and subsequently discharged). As of June 1983, all gymnasium employees were Church members who "have complied or are complying with Church employment eligibility policies" (Heaps Affidavit at 3).

[4] The Church apparently does not apply this employment policy to the profit-making, tax-paying entities that it controls. Affidavit of Wayne Nelson, dated April 12, 1985, at 3.

Mayson did not qualify and was discharged on April 10, 1981. J.S. App. 3a-4a, 17a, 119a; Homer Affidavit at 4; Affidavit of Arthur Mayson, dated August 16, 1983, at 4-5, 7.

2. Mayson and several other individuals who lost jobs in Church activities because they did not obtain a temple recommend subsequently commenced this action against the COP and the CPB in the United States District Court for the District of Utah.[5] The

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[5] The complaint was styled as a class action, but the district court did not certify a class. The other individual plaintiffs included appellees Christine J. Amos, Judy L. Bawden, Deniece Kanon, April Joyce Riding, Ruth Arriola, and Shelleen Adamson, who were employed as seamstresses at Beehive Clothing Mills, a Church owned and operated establishment that manufactures sacred garments worn by Church members in religious ceremonies. Each of these individuals was discharged after she failed to satisfy the requirements for a temple recommend. J.S. App. 3a-4a. The district court did not resolve these appellees' claims because it found that disputed issues of fact precluded a determination on motion for summary judgment regarding whether Beehive constitutes a religious or a secular activity (*id.* at 18a-19a, 93a-105a).

Appellee Ralph Whitaker was employed by Deseret Industries, a division of the Church's Welfare Services Department, and also lost his job because he failed to obtain a temple recommend (J.S. App. 105a-107a). The district court concluded that "Deseret Industries is a religious activity as there is an intimate connection between Industries and the defendants and the Mormon Church and between the primary function of Industries and the religious tenets of the Church" (*id.* at 116a). The court granted summary judgment in favor of the COP and the CPB with respect to appellee Whitaker's claim, holding that religious activities conducted by religious organizations are exempt from Title VII's prohibition against discrimination on the basis of religion (*id.* at 105a). Appellee Whitaker has not sought review of that determination.

plaintiffs claimed that the discharges for failure to obtain a temple recommend constituted discrimination in employment on the basis of religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a).[6]

The COP and the CPB moved to dismiss the action, relying on Section 702 of Title VII, 42 U.S.C. 2000e-1, which states that Title VII "shall not apply * * * to a religious corporation * * * with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation * * * of its activities." The district court denied the motion, holding that Section 702 violated the Establishment Clause insofar as it exempted the secular activities of religious organizations from the provisions of Title VII prohibiting religious discrimination (J.S. App. 1a-82a).

Starting from the premise that religious activities conducted by religious organizations could permissibly be exempted from Title VII's nondiscrimination mandate, the district court as a threshold matter considered whether the Deseret Gymnasium constituted a religious activity. The court formulated a three-part test for determining whether an activity conducted by a religious organization is "religious" or "secular." It first evaluated "the tie between the religious organization and the [gymnasium] with regard to areas such as financial affairs, day-to-day operations and management" (J.S. App. 10a). Observing

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[6] The statute bars an employer from "discharg[ing] any individual * * * because of such individual's * * * religion" (42 U.S.C. 2000e-2(a)(1)). The plaintiffs also argued that the discharges violated the parallel provision of the Utah anti-discrimination statute, Utah Code Ann. § 34-35-6(1) (Supp. 1986).

that Church officials appoint the members of the governing board of the Deseret Gymnasium and that the gymnasium has no financial existence independent of the COP (*id.* at 11a-12a), the court concluded that "there is an intimate connection between Deseret and the defendants and the Mormon Church" (*id.* at 12a).

The court next considered whether there was "a clear relationship between the primary function which Deseret performs and the religious beliefs and tenets of the Mormon Church or church administration" (J.S. App. 13a). It found that "[a]lthough the Mormon Church has expressed its desire that members of the Mormon Church engage in physical exercise and [has] attempted to provide a facility to accommodate that desire in an atmosphere which exemplifies its beliefs, the function of Deseret is far from closely related to any religious beliefs or tenets of the Mormon Church or church administration" (*id.* at 16a (footnote omitted)). The court concluded that the Deseret Gymnasium instead serves the same functions as other gymnasiums.

Finally, because it had found no close connection between the gymnasium and church doctrine or administration, the court inquired further concerning appellee Mayson's particular job. It found that "[n]one of [Mayson's] duties is even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration" (J.S. App. 17a). It therefore concluded that the operation of the gymnasium did not constitute a religious activity.

Turning to the question whether the application of Section 702 to a religious organization's secular activities violates the Establishment Clause, the district court evaluated the constitutionality of Section 702

by utilizing the three-part test prescribed by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The district court first found that the 1972 amendment to Section 702 extending the exemption to all of the activities of religious organizations was supported by the secular purpose of limiting government interference with religious activities. The court observed that "[t]he legislative goal of assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions is a valid secular purpose. Furthermore, there is no indication that Congress amended section 702 for a religious purpose or to promote religion or religious beliefs" (J.S. App. 40a (footnote omitted)).

The court concluded, however, that Section 702 failed the second part of the *Lemon* test because the provision has the primary effect of advancing religion. The court acknowledged that " 'the limits of permissible state accommodation of religion are by no means co-extensive with the noninterference mandate of the free exercise clause' " (J.S. App. 42a-43a, quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970)), but it stated that "if a statute goes beyond what is mandated by the free exercise clause in accommodating religion, the statute may no longer maintain the requisite course of constitutional neutrality" (J.S. App. 43a). The court then determined (*id.* at 43a-58a) that the exemption of the secular activities of religious organizations from Title VII's prohibition against religious discrimination is not necessary to avoid excessive government entanglement with religion and is not compelled by the Free Exercise Clause.

The court also found that Section 702 lacks "characteristics that the Supreme Court has looked to in

declaring statutes valid as against claims of establishment clause violations" (J.S. App. 66a). It observed that the exemption did not extend to "a broad spectrum of groups" but was limited to religious organizations (*id.* at 61a), the exemption was not supported by historical tradition or by any threat of hostility to religion, and the exemption was not justified by the concerns underlying the Free Exercise Clause (*id.* at 66a-69a). The court found that Section 702 instead amounts to government sponsorship of religion because it allows religious organizations to increase their influence over the secular economy and "grant[s] religious organizations an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices" (J.S. App. 70a).

Finally, the district court applied the third prong of the *Lemon* test, considering whether Section 702 fostered excessive government entanglement with religion. The court found that the exemption enables a religious organization to exercise "coercive power" over the religious beliefs of its employees, and that this "potential for impermissible fostering of religion" supports a "finding of excessive entanglement" (J.S. App. 74a). The court observed, however, that "Section 702 does not require the type of comprehensive, discriminatory and continuous state or federal surveillance that was condemned in cases such as *Lemon*. * * * On the contrary, this exemption was designed to minimize involvement and entanglement between church and state and to ensure that the government and courts do not go through the rigors of inspecting and analyzing whether the activities in which a religious entity is engaging are religious or secular, thus avoiding an intimate and continuing

relationship between church and state" (J.S. App. 74a-75a (footnote omitted)).

The court concluded that it was not necessary to balance the three *Lemon* factors. It found that "the direct and immediate effect of the exemption of religious organizations from Title VII for religious discrimination in secular, non-religious activities is to advance religion in violation of the establishment clause of the first amendment to the United States Constitution" (J.S. App. 75a).[7] Implicitly holding that the discharge of appellee Mayson was the result of religious discrimination, the court concluded that the discharge violated Title VII. It ordered the reinstatement of appellee Mayson and awarded back pay with interest (J.S. App. 116a-120a). On January 22, 1986, the court entered a final judgment in favor of appellee Mayson under Rule 54(b) of the Federal Rules of Civil Procedure (see J.S. App. 128a).

The district court vacated this judgment on February 4, 1986, and on February 5 issued an order (J.S. App. 127a-129a) certifying to the Attorney General of the United States that the constitutionality of Section 702 had been drawn into question in the present case (see 28 U.S.C. 2403(a)). The United States intervened and filed a brief defending the constitutionality of Section 702. Following a

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[7] The court indicated that its "determination regarding [Section 702] applies with equal force to the [parallel] state law exemption as it relates to the facts of this case" (J.S. App. 8a). It declined to address appellees' arguments that the application of Section 702 to secular activities violates the due process and equal protection principles embodied in the Fifth Amendment (J.S. App. 76a), and it dismissed appellees' state law claims for wrongful discharge and intentional infliction of emotional distress (*id.* at 77a-82a).

hearing, the district court reaffirmed its prior determination and again entered a final judgment in favor of appellee Mayson. J.S. App. 83a-87a.

SUMMARY OF ARGUMENT

The statutory provision at issue in this case, Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, embodies Congress's determination that its prohibition of religious discrimination in employment should not be applied to the employment practices of religious organizations. The district court erred in concluding that the Establishment Clause bars Congress from accommodating religion in this manner and instead requires Congress to apply that prohibition when a religious employer's hiring decisions relate to its secular activities.

This Court repeatedly has recognized government's authority to lessen burdens on religious practice and thereby enhance the ability of religious institutions and religious individuals to conduct themselves in accordance with their beliefs. While the Free Exercise Clause obligates government to accommodate religion in some circumstances, it does not exhaust the possibilities of permissible governmental accommodation of religion. Indeed, the Establishment Clause itself is a guarantee of religious liberty, ensuring that government will not interfere or become entangled with religion.

Exemptions from obligations imposed by government upon the public at large—such as the tax exemptions available to religious institutions—constitute perhaps the most familiar type of accommodation of religion. By removing the church from the interfering influence of the state, such exemptions typically further the central goal of both of the Religion Clauses: "to prevent, as far as possible, the

intrusion of either [the church or the state] into the precincts of the other" (*Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971)).

Section 702 closely resembles the exemptions of this sort previously approved by this Court. Congress concluded that the application of the antidiscrimination rule to religious institutions might well result in a conflict with religious belief. It also recognized that a narrower exemption would require government inquiry into religious beliefs, government investigation of religious activities, and difficult decisions regarding religious justifications for religion-based hiring, and adopted a broad exemption that avoids these entangling effects. By seeking to prevent government interference with religion, and selecting the legislative course most likely to avoid such entanglement, Congress surely did not violate the Establishment Clause.

In addition, Section 702 does not result in the sort of affirmative involvement of the state in religious activity that is forbidden by the Establishment Clause. Thus, Section 702 is neutral among religious denominations, does not confer government power upon religious organizations or convey a message of government endorsement of religious organizations, does not provide government financial support for religious activities, and does not authorize the use of government power to coerce an individual's religious choice.

The foregoing demonstrates that Section 702 satisfies the test established by this Court in *Lemon* v. *Kurtzman*, *supra*. Congress's purpose of accommodating religious organizations comports with the goal of avoiding interference of government with religion that lies at the heart of the Religion Clauses, and is

therefore entirely lawful. Similarly, the sole effect of the statute, which is to accomplish that accommodation, does not violate the Constitution. Finally, Section 702 minimizes rather than aggravates the possibility of government entanglement with religion. The *Lemon* test therefore confirms that Section 702 is a permissible accommodation of religion.

ARGUMENT

SECTION 702 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Title VII of the Civil Rights Act of 1964 prohibits an employer from "discharg[ing] any individual * * * because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e-2 (a)(1)). Section 702 of the original Act partially exempted religious organizations from this general rule, providing that the antidiscrimination requirement does not apply to a religious organization "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [organization] of its religious activities" (42 U.S.C. (1964 ed.) 2000e-1).

Congress altered the religious organization exemption in 1972, broadening it to apply to both the secular and the religious activities of religious institutions. See Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972). Under the amended version of Section 702, a religious organization is free to take religion into account in all of its personnel decisions. 42 U.S.C. 2000e-1; see S. Conf. Rep. 92-681, 92d Cong., 2d Sess. 16 (1972) (the amendment "expanded the exemption for religious organizations from coverage [under Title VII] with respect to the employment of individuals of a particular religion in all their ac-

tivities instead of the present limitation to religious activities"); 118 Cong. Rec. 7167 (1972) (section-by-section analysis of bill reported by the conference committee).

The legislative history reveals that Congress amended Section 702 in order to prevent government interference with religious institutions.[8] Senator Ervin, one of the principal sponsors of the amendment, observed that limitation of the exemption to a religious organization's religious activities "would split the activities of a religious organization into two segments, although they are irretrievably held mainly by the organization itself," and permit government oversight of the organization's employment decisions with respect to employees who did not "work strictly in the religious field" (118 Cong. Rec. 1977 (1972)). He argued that "[w]hen the Federal Government begins to grasp the power of things of the Lord, it is reaching a state of governmental intemperance which is alien to the first amendment" (*ibid.*). Senator Ervin concluded that Congress was not "securing religious liberty from the invasion of the civil authorities when [it] give[s] the civil authorities power to regulate whom religious institutions * * * can employ, whom they must promote, whom they must retain in employment, and whom

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[8] The Senate debated several proposals concerning the religious institution exemption, including an amendment that would have exempted religious organizations from all of the antidiscrimination requirements of Title VII. Some of the comments discussed in the text are taken from the debate on these broader proposals. Senators Ervin and Allen sponsored both the broader and the narrower measures, and their comments therefore are relevant in ascertaining the purpose of the exemption that was adopted by Congress.

they may fire." *Id.* at 1979; see also *id.* at 946-949 (remarks of Sen. Allen).

Senator Ervin also noted the problems that would be encountered in attempting to distinguish a religious organization's religious activities from the organization's secular activities. He observed that the limited religious institution exemption "attempt[ed] to do an impossible thing, that is to separate the religious activities of a religious [organization] * * * from those of its activities which can be said to be not religious, nonreligious, or unreligious" (118 Cong. Rec. 1973 (1972)).

A. Section 702 Is A Permissible Accommodation Of Religion

The question in the present case is whether Congress's decision to expand Section 702 in order to prevent government interference with religious institutions constitutes an establishment of religion violative of the First Amendment. We do not assert that the amendment of Section 702 to encompass all activities of religious institutions was required by the Free Exercise Clause. The statutory provision does, however, further the values embodied in both the Free Exercise and Establishment Clauses, and does not run afoul of the limitations upon government action imposed by the Establishment Clause. We believe, therefore, that Section 702 is a valid exercise of the government's discretionary authority to accommodate religious beliefs and institutions.[9]

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[9] In its November 3, 1986 order in these cases, the Court postponed further consideration of the question of jurisdiction to the hearing of the cases on the merits. The district court initially entered judgment in favor of appellee Mayson on January 22, 1986, but that order was vacated on February 4,

1. *This Court Has Made Clear That Government May Accommodate Religion Through Exemptions From Generally Applicable Regulatory Standards*

The "first and most immediate purpose [of the Establishment Clause] rested on the belief that a

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1986, pursuant to a timely motion for reconsideration filed by the private appellees under Fed. R. Civ. P. 59. We moved to intervene as of right pursuant to Fed. R. Civ. P. 24(a) and 28 U.S.C. 2403 on March 7, 1986, and the district court granted our motion on March 19, 1986; we filed a brief and presented oral argument in support of the constitutionality of Section 702; and the district court issued an order on May 16, 1986 "reaffirming and re-entering" its prior judgment in favor of appellee Mayson. See J.S. App. 83a-87a.

In our view, 28 U.S.C. 1252 plainly supplies jurisdiction over these appeals. That statute provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action * * * to which the United States * * * is a party." All of these statutory requirements are satisfied in the present case. First, the United States became a party to this action prior to the issuance of the order on appeal holding Section 702 unconstitutional. It is settled that intervention by the United States satisfies the statutory requirement that the United States be a "party" to the action. See *ILGWU* v. *Donnelly Garment Co.*, 304 U.S. 243, 249 (1938). Second, the fact that the district court issued a prior order has no effect upon the appealability of the second, effective order. The initial order was vacated pursuant to a timely motion for reconsideration and therefore is a nullity. Moreover, the fact that the district court relied on its prior order cannot prevent review of the judgment of unconstitutionality that is the basis for its second order. Cf. *United States* v. *Clark*, 445 U.S. 23, 25-27 n.2 (1980). Third, this case qualifies as a "civil action"; it was commenced by appellees pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Fourth, the district court held an Act of Congress unconstitutional. It expressly declared Section 702 unconstitutional on its face

union of government and religion tends to destroy government and to degrade religion. * * * The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Engel* v. *Vitale*, 370 U.S. 421, 431-432 (1962) (footnote omitted); see also *Abington School District* v. *Schempp*, 374 U.S. 203, 221-223 (1963).

"[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity" (*Walz* v. *Tax Commission*, 397 U.S. at 668). The central goal of the Clauses, therefore, is "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lemon* v. *Kurtzman*, 403 U.S. at 614; see also *Walz* v. *Tax Commission*, 397 U.S. at 669 ("[t]he general principle deducible from the First Amendment and all

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to the extent the statute exempts the secular activities of religious organizations from Title VII's nondiscrimination mandate (see J.S. App. 75a). This holding was necessary to the court's award of relief to appellee Mayson. (Even had the district court held Section 702 unconstitutional as applied to appellee Mayson, this Court would have jurisdiction under Section 1252. See *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *California* v. *Grace Brethren Church*, 457 U.S. 393, 405 (1982).) Finally, the statute permits "any party" to appeal, and both the United States and the private defendants have appealed to this Court. For these reasons, the Court plainly has appellate jurisdiction over the district court's judgment in this case.

that has been said by this Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion"). Thus, the Establishment Clause no less than the Free Exercise Clause may be seen as a guarantee of religious liberty: the liberty of religion to be free of meddling by the state and of individuals to be free of the compulsion of state sponsored religion. Accommodation to religion in the form of an exemption from government regulation plainly furthers these values, and therefore is most unlikely to offend the Establishment Clause.

a. The Court repeatedly has acknowledged that government may act to lessen burdens upon religious practice and thereby enhance the ability of religious institutions and religious individuals to conduct themselves in accordance with their beliefs. Thus, the Court has observed that "the Constitution * * * affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984); see also *Wallace* v. *Jaffree*, No. 83-812 (June 4, 1985), slip op. 16-18 (O'Connor, J., concurring in the judgment); *Thomas* v. *Review Board*, 450 U.S. 707, 726-727 (1981) (Rehnquist, J., dissenting). "[T]he interrelationship of the Religion Clauses has permitted government to take religion into account * * * to exempt, when possible, from generally applicable governmental regulation individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel* v. *Paty*, 435 U.S. 618, 638-639 (1978) (Brennan, J., concurring) (footnotes omitted).

This vigorous endorsement of government accommodation of religion has its source in the significant role that religion has played in our society since the founding of the Nation. Our traditions encourage government to act in a manner that enhances an individual's ability to observe his faith. *Lynch* v. *Donnelly*, 465 U.S. at 677-678 (citations omitted) ("evidence of accommodation of all faiths and all forms of religious expression" pervades our Nation's history; "[t]hrough this accommodation * * * governmental action has 'follow[ed] the best of our traditions' and 'respect[ed] the religious nature of our people' "); *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952) ("[w]e are a religious people whose institutions presuppose a Supreme Being"); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 14-24.

Indeed, the impetus to government accommodation is rooted in the Constitution itself: the Free Exercise Clause embodies a special solicitude for religious liberty, obligating the government to adjust its policies in some circumstances so as to avoid interference with religious institutions. See, *e.g.*, *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 721-722 (1976); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 114-116 (1952); cf. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979). Accommodation by government of religious institutions, far from constituting a forbidden establishment of religion, expresses a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*Walz* v. *Tax Commission*, 397 U.S. at 669).

The Court has made clear, moreover, that the government's authority to accommodate religion is not

limited to the measures required by the Free Exercise Clause: "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the revolution itself." *Walz* v. *Tax Commission*, 397 U.S. at 673; see also *Bowen* v. *Roy*, No. 84-780 (June 11, 1986), slip op. 18 & n.19 (opinion of Burger, C.J.); *Wallace* v. *Jaffree*, slip op. 16 (O'Connor, J., concurring in the judgment); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *TWA* v. *Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting); *Gillette* v. *United States*, 401 U.S. 437, 453 (1971); *Welsh* v. *United States*, 398 U.S. 333, 371-372 (1970) (White, J., dissenting); *McGowan* v. *Maryland*, 366 U.S. 420, 520 (1961) (Frankfurter, J., concurring).

b. The present case concerns the scope of the government's discretionary authority to accommodate religious practice, which is bounded on the bottom by the mandate of the Free Exercise Clause and on the top by the prohibition contained in the Establishment Clause. Since the question here is whether a particular sort of government accommodation of religion —a statute that exempts religious individuals or institutions from an obligation imposed upon other members of society—exceeds the "ceiling" upon permissible government action imposed by the Establishment Clause, it is necessary to consider how the values embodied in the Establishment Clause relate to an accommodation of this type.

An exemption that excuses religious individuals or organizations from a general obligation invariably will have the effect of reducing government interference with religion because it eliminates a govern-

ment-imposed rule that may limit the ability of the individual or organization to follow the tenets of religious faith. By removing the church from the interfering influence of the state, the exemption furthers the purposes of the Establishment Clause—to prevent government entanglement with religion and foster religious liberty. In addition, because the exemption reflects a government decision not to involve itself with religion, explicit exemption is the form of government acknowledgment of religion least likely to constitute forbidden affirmative involvement of the state in religious activity.[10]

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[10] Appellees assert (Mot. to Aff. 19) that this Court frequently has "invalidated or denied" exemptions drawn on religious lines. They attempt to support this position by citing decisions of this Court holding that—in the particular circumstances of each case—the Free Exercise Clause did not *require* the adoption of a religion-based exemption. *E.g., Bowen* v. *Roy*, No. 84-780 (June 11, 1986); *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986); *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985); *United States* v. *Lee*, 455 U.S. 252 (1982). But Congress did adopt such an exemption when it enacted Section 702, and this case therefore presents a different question—whether the Establishment Clause prohibits such an accommodation. Since the Court has made clear that Congress's authority to accommodate religion is not limited to those measures required by the Free Exercise Clause, the decisions cited by appellees interpreting the Free Exercise Clause are obviously beside the point.

Welsh v. *United States*, 398 U.S. 333 (1970), another case cited by appellees to support their claim that religion-based exemptions generally violate the Constitution, plainly does not stand for that proposition. A plurality of four Justices decided the case on statutory grounds, concluding that Congress intended to exempt from the draft persons who object to military service on grounds of public policy as well as persons who object on religious grounds (398 U.S. at 335-344). Only Justice Harlan concluded that an exemption limited to persons

The striking congruence between the goals of the Religion Clauses and the likely effects of religion-based exemptions from obligations imposed by government upon the general public strongly supports the constitutionality of such measures. It is not surprising, therefore, that the Court repeatedly has approved exemptions of this type. Thus, the religious accommodations required by the Free Exercise Clause generally take the form of religion-based exemptions. The Court has expressly rejected the contention that such action violates the Establishment Clause. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. at 234-235 n.22; *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963).

The Court also has approved such exemptions without relying upon the Free Exercise Clause, recognizing that the political branches have discretion to adopt such exemptions without triggering the prohibitions imposed by the Establishment Clause. For example, in *Zorach* v. *Clauson*, *supra*, the Court upheld a statute permitting the release of a student from public school classes so that the student could attend a religious center for religious instruction. The Court observed that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions," and held that the exemption on religious grounds from the compulsory attendance requirement did not effect an establishment of religion (343 U.S. at 313-314).

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who opposed military service on the basis of their religious beliefs would violate the Establishment Clause (*id.* at 356-361). Three Justices rejected this view of the constitutional issue, concluding that such an exemption would not effect an establishment of religion (*id.* at 369-374 (White, J., dissenting)).

Similarly, in *Walz* v. *Tax Commission*, *supra*, the Court rejected an Establishment Clause challenge to a statute creating a property tax exemption for property owned by religious organizations and used for religious purposes. The Court could not "read [the] statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions." 397 U.S. at 673; see also *Bowen* v. *Roy*, slip op. 18 n.19 (opinion of Burger, C.J.) (indicating that although an exemption from a social security law requirement was not mandated by the Free Exercise Clause, such an exemption would not violate the Establishment Clause); *United States* v. *Lee*, 455 U.S. 252, 260 & n.11 (1982) (indicating approval of statute exempting religious objectors from the obligation to pay social security taxes); *Gillette* v. *United States*, *supra* (upholding exemption from the military draft for conscientious objectors); *Braunfeld* v. *Brown*, 366 U.S. 599, 608 (1961) (plurality opinion) (indicating that Sabbatarian exception to Sunday closing laws would be constitutionally permissible); *Selective Draft Law Cases*, 245 U.S. 366, 389-390 (1918) (upholding exemption from the draft for religious objectors).[11]

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[11] *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), concerned the authority of the National Labor Relations Board over teachers employed in church-operated schools. The Court construed the National Labor Relations Act to exclude coverage of such teachers on the ground that a contrary result would require the Court "to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses" (440 U.S. at 507). Thus, the Court expressly recognized an exemption for religious institutions from a generally applicable regulatory requirement. See also *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981)

2. *Section 702 Minimizes Entanglement Between Government and Religion And Effects No Sponsorship or Financial Assistance of Religion*

Section 702 fits squarely within these prior decisions. By exempting religious institutions from a governmentally-imposed burden, it promotes the values embodied in the Religion Clauses. Moreover, Section 702 has none of the effects that this Court has cited in striking down government action under the Establishment Clause. Section 702 therefore is plainly constitutional.[12]

a. As we have discussed (see pages 18-21), the central purpose of the Religion Clauses is to ensure noninterference by government in religion. The Court in *Walz* v. *Tax Commission*, *supra*, upheld the property tax exemption at issue in that case after finding that the exemption (1) "spar[ed] the exercise of religion from the burden of property taxation," thereby eliminating any danger of oppressive government action stemming from hostility to religion, and (2) lessened government entanglement with religion. 397 U.S. at 673, 674-675; see also *Wallace* v. *Jaffree*, slip op. 17 (O'Connor, J., concurring in the judgment) (defining an accommodation of religion as a government action that "lifts a government-imposed burden on the free exercise of religion"); *Marsh* v. *Chambers*, 463 U.S. at 804 (Brennan, J., dissenting) (footnote omitted) (improper government interference with religion may

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(church-run schools exempted from mandatory coverage under Federal Unemployment Tax Act).

[12] We note that Congress and the Executive Branch have adopted other religion-based exemptions similar to Section 702. See *e.g.*, 26 U.S.C. 512(b)(12) and (15); 26 U.S.C. 3309(b); 26 U.S.C. 6033(a)(2)(A); 29 C.F.R. 779.214.

result if government "unduly involv[es] itself in the supervision of religious institutions or officials"). The goal of noninterference of government in religion plainly is furthered by Section 702.

As a threshold matter, Congress's judgment that Section 702 furthers the goal of noninterference of government in religion is entitled to deference. Cf. *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 322-323 (1985); *Gillette* v. *United States*, 401 U.S. at 460. A court should not lightly overturn Congress's conclusions—based upon its assessment of the relevant interests—that its program for combatting religious discrimination in employment should be adjusted to avoid government interference in religion, and that a broad prophylactic exemption is the appropriate means by which to reduce the potential for interference with this aspect of religious organizations' employment decisions. Indeed, where Congress has made a judgment that the government interest underlying a regulatory program does not justify the extension of the regulation to religious organizations, there would appear to be little reason for a court to insist upon the expansion of the regulatory program, thereby triggering government interference with religion that Congress deemed wholly unnecessary to fulfill its underlying purposes.

Moreover, an assessment of the relevant interests indicates that Congress correctly concluded that Section 702 furthers the values of the Religion Clauses by eliminating a source of government interference with religion. The Free Exercise Clause undoubtedly requires government to permit religious organizations to consider religion in connection with some of their employment decisions: clergymen plainly may

be hired on the basis of religion. And a religious organization's employment decisions frequently may be based upon religious belief even if the tasks to be performed by a prospective employee seem wholly secular to an outsider. For example, the organization's religious tenets may impose an obligation to assist members of its own faith in finding employment. In addition, a religious organization plainly has an associational interest in maintaining its cohesiveness; it may wish to serve that interest by limiting employment to coreligionists. A rule barring a religious organization from taking religion into account in employment decisions therefore is likely to burden the ability of the organization to conduct its affairs in accordance with the dictates of its faith and its religious identity and mission.

In the present case, the Church personnel policy that led to the discharge of appellee Mayson rests in part on these considerations (see pages 5-6, *supra*). Indeed, to the extent that the Church's policy is dictated by its religious beliefs, a rule barring the Church from hiring on the basis of religion would implicate the Free Exercise Clause. Section 702 thus promotes religious autonomy, avoids the need for difficult inquiries under the Free Exercise Clause, and eliminates possible government interference with religion by exempting religious institutions from a government regulation that would override their desire to act pursuant to their beliefs.[13]

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[13] Appellees suggest (Mot. to Aff. 14-15, 21) that the government cannot assert a legitimate interest in avoiding this sort of entanglement with religion because Congress has not created similar exemptions in other contexts. The district court observed (J.S. App. 45a-52a) that courts already examine the employment practices of religious institutions in

Limiting the exemption to "religious" activities—the rule adopted by the district court—would interfere with religion by discouraging a religious organization from taking religion into account in employment decisions for jobs which outsiders might view as "secular". The fundamental difficulty with such a rule, which is well illustrated by this case, flows from the uncertainty of the line between religious and secular activities. Thus, the district court concluded that the Church's Welfare Services Department constitutes a religious activity (J.S. App. 116a), but found that the manufacture of sacred garments worn by Church members in religious ceremonies might not be a religious activity (*id.* at 18a-19a, 93a-105a). It is hard to see any clear distinction between these two activities, each of which implicates the Church's religious tenets, but the district court found that disputed facts precluded a finding as to the status of garment manufacturing.

In order to apply an exemption limited to religious activities, moreover, the government would be re-

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connection with Title VII's prohibition against discrimination on the basis of race, color, national origin and sex.

There is no basis for the claim that Congress's decision not to adopt a broad exemption vitiates the justification for the more tailored exemption that it chose to enact. Indeed, Congress's determination was entirely reasonable because, as the district court acknowledged (J.S. App. 51a), it is more probable that employment decisions based upon religion would be tied to the tenets of the religious organization, and claims of religious discrimination are more likely to require government review of religious beliefs, especially where the permissibility of such discrimination turns upon distinguishing between religious and secular activities. Congress was free to enact the limited exemption contained in Section 702 in order to eliminate the most likely source of intrusion upon religious beliefs.

quired to conduct an inquiry into the organization's religious beliefs and examine the characteristics of the activity implicated by each claim of religious discrimination. Second-guessing of a religious organization's view of the dictates of its own religion, government investigation of religious activities, and "the direct confrontation and conflicts that follow in the train of those legal processes" all constitute government interference with religion that Congress could legitimately seek to avoid. *Walz* v. *Tax Commission*, 397 U.S. at 674; *id.* at 691 (Brennan, J., concurring); see also *Widmar* v. *Vincent*, 454 U.S. at 269-270 n.6 (government inquiry "into the significance of words and practices to different religious faiths" would "tend inevitably to entangle the State with religion in a manner forbidden by [this Court's] cases").[14]

An exemption limited to "religious" activities would also mean that religious organizations act at their peril in making religion-based employment decisions. They could never be certain whether the particular activity would subsequently be found to be "religious" rather than "secular." The possibility of liability under Title VII might make a religious organization reluctant to consider religion in its employment decisions even where that approach would later be found wholly permissible on the ground that the activity was in fact religious.

In upholding the tax exemption in *Walz* v. *Tax Commission*, *supra*, the Court observed that "[e]i-

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[14] Such assessments of the religious character of various activities would be conducted not only by courts, but at various levels within the Equal Employment Opportunity Commission, through its broad authority to investigate discrimination complaints (see *EEOC* v. *Shell Oil Co.*, 466 U.S. 54 (1984)).

ther course, taxation of churches or exemption, occasions some degree of involvement with religion" (397 U.S. at 674), and noted with approval that the exemption resulted in a lesser degree of entanglement between government and religion. 397 U.S. at 674-75; see also *Gillette* v. *United States*, 401 U.S. at 457-458. Here, Congress decided that religious institutions' employment decisions should be governed by the rule that is most likely to avoid government interference with religion. Indeed, its decision pretermits the difficult inquiries that would be necessary under a narrower rule. Section 702 therefore furthers the noninterference of government in religion that is the purpose of the Religion Clauses.[15]

b. Moreover, Section 702 does not amount to " 'sponsorship, financial support, and active involvement of the sovereign in religious activity' " that is forbidden by the Establishment Clause. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 772 (1973) (citation omitted); see

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[15] Our discussion of the burdens upon religious organizations that would result from the elimination or narrowing of Section 702 should not be taken to indicate that we believe that these burdens are sufficient to implicate the Free Exercise Clause in every case. That inquiry, of course, turns upon whether the government action prevents an individual or organization from practicing its religion. See *Wisconsin* v. *Yoder*, 406 U.S. at 215-219. This Court's recognition of government's authority to accommodate religion where accommodation is not required by the Free Exercise Clause makes clear that government may act to avoid interference with religion that falls short of a violation of the Free Exercise Clause. There is no reason to construe the Constitution to *prevent* Congress from obviating Free Exercise Clause inquiry in a class of cases when it deems government intrusion unnecessary.

also *School District* v. *Ball*, No. 83-990 (July 1, 1985), slip op. 7.[16]

First, Section 702 is neutral among religions. "The clearest command of the Establishment Clause," this Court has stated, "is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); see *Gillette* v. *United States*, 401 U.S. at 449. One important aspect of neutrality is that the government not "confer any imprimatur of state approval on any religious sects or practices." *Widmar* v. *Vincent*, 454 U.S. at 274. Thus, a governmental accommodation to religion might be invalid if it discriminated among religions or if it amounted to an endorsement of a particular religion.

The exemption contained in Section 702 does not breach this requirement because it is available to all religious organizations; the statute makes no distinction on the basis of belief. Although the provision does treat religious organizations differently from other organizations, that fact alone cannot amount to prohibited government sponsorship of religion. All accommodations of religion would otherwise be barred by the Establishment Clause and the special solicitude for religion expressed by the Free

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[16] It is noteworthy that even if Section 702 were limited to religious activities—an exemption that the district court found to be constitutional—its effects would be the same as Section 702 in its present form, and would differ only in the number of jobs affected. It is difficult to believe that this difference in degree dictates a different outcome of the Establishment Clause analysis, because "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion" (*Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971) (plurality opinion)). See also note 22, *infra*.

Exercise Clause would itself constitute a constitutional anomaly. The well-settled principle of accommodation of religion (see pages 20-25, *supra*) therefore makes clear that a distinction of this type does not offend the Establishment Clause.[17]

Second, Section 702 does not promote the "symbolic union of church and state" (*School District* v. *Ball*, slip op. 16), or make "adherence to a religion relevant in any way to a person's standing in the polit-

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[17] The district court indicated (J.S. App. 61a, 66a-67a) that Section 702 violated the Constitution because the exemption does not extend to "a broad spectrum of groups," but is " 'limited to religious institutions' " and because Section 702 is not supported by an "historical tradition." The Court in *Walz* did cite these factors in upholding the tax exemption at issue in that case (see 397 U.S. at 673, 675-678). However, it is difficult to see how those factors could be controlling because they have not been present in other cases in which this Court has indicated that a discretionary accommodation of religion would not violate the Establishment Clause. See pages 24-25, *supra*.

Moreover, similar factors are present here. Title VII contains a variety of exemptions designed to serve various public policies. See, *e.g.*, 42 U.S.C. 2000e(b) (exemption for employers with less than 15 employees); 42 U.S.C. 2000e(f) (exemption for staffs of public officials). Thus, as with the tax exemption considered in *Walz*, religious organizations are not alone in being accorded special treatment. And, although government regulation of discrimination in private employment is of a relatively recent vintage, Congress recognized the propriety of some form of exemption for religious organizations as soon as it adopted a prohibition against religious discrimination. That exemption plainly is justified by the same fear of retaliation against religion that the Court cited in *Walz* (see 397 U.S. at 674). The authority to investigate a religious organization and override an organization's personnel decisions obviously could be applied by hostile plaintiffs —or a government agency—in a manner that disrupts the religious organization.

ical community" (*Lynch* v. *Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring)). In *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982), for example, the Court held that a statute giving churches the power to bar the issuance of liquor licenses to establishments located near them violated the Establishment Clause because it "enmesh[ed] churches in the exercise of substantial governmental powers." 459 U.S. at 126; see also *School District* v. *Ball*, slip op. 16 (if the government action "conveys a message of government endorsement or disapproval, a core purpose of the Establishment Clause is violated"). Section 702 neither permits religious organizations to exercise governmental authority nor confers upon government the authority to regulate religious organizations; and the exemption does not convey a message of government endorsement of religion. Far from symbolizing the union of church and state, it reinforces the noninterference of one in the other that is at the heart of the Religion Clauses.

Third, Section 702 does not result in government financial support of religious activities. See *School District* v. *Ball*, slip op. 11-12. The district court suggested (J.S. App. 69a-70a) that Section 702's exemption for secular activities would enable religious organizations to expand their business interests, but failed to offer any explanation for that conclusion. The district court did not expressly find that the exemption provides religious employers with any financial advantage over secular competitors and nothing in its opinion—or in the record in this case—supports that conclusion.[18] Indeed, the limited

[18] Appellees have attempted (Mot. to Aff. 17, 25-26) to support the district court's intimation that Section 702 confers a financial benefit on religious organizations by arguing that the Church's tithing obligation—enforced through the threat

scope of the exemption weighs against a finding of financial advantage. Religious organizations remain subject to Title VII's prohibition against discrimination based on race, color, national origin and sex and are required—like all other covered employers—to report the race, color, national origin and sex of their employees to the Equal Employment Opportunity Commission (29 C.F.R. 1602.7).[19]

Even if the district court had identified some incidental financial benefit resulting from Section 702, moreover, that fact would not render the exemption violative of the Establishment Clause. This Court has rejected claims that incidental financial benefits caused by an exemption from a generally applicable government burden automatically render the exemp-

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of discharge from employment—produces an economic benefit to the Church. But the district court did not refer to tithing and nothing in the record indicates the extent of the Church's financial gain from tithing, whether the Church lawfully could accomplish the same result by reducing salaries paid to Church members, and whether any financial gain outweighs the losses suffered as a result of the limitation of the labor pool to those individuals who are willing to tithe and obey all other Church requirements necessary to obtain a temple recommend.

More fundamentally, however, the constitutionality of Section 702 should not turn on the practices or belief of a particular religious group. Such a result would require courts, with very little guidance, to make myriad decisions not only whether a particular activity was sufficiently religious to merit exemption from Title VII's ban against religious discrimination, but also to evaluate particular religious practices. In addition, Section 702 then might be found constitutional as applied to some religious groups and unconstitutional as to others, potentially implicating the Establishment Clause's command of neutrality among religions (see page 32, *supra*).

[19] No employer, religious or secular, is required to report the religion of its employees.

tion invalid. Thus, the tax exemption approved in *Walz* v. *Tax Commission*, *supra*, plainly conferred a far greater financial benefit than religious organizations could secure as a result of the narrow exemption permitted by Section 702. Yet the Court in that case rejected the argument that the tax exemption afforded impermissible financial assistance to religion. 397 U.S. at 675; see also *Mueller* v. *Allen*, 463 U.S. 388 (1983) (tuition tax deductions); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (exemption of church-operated schools from unemployment taxes); cf. *Witters* v. *Washington Department of Services for the Blind*, No. 84-1070 (Jan. 27, 1986) (extension of aid pursuant to state vocational rehabilitation program to finance petitioner's theological training at a Christian college). The same reasoning requires the rejection of the argument that Section 702 is unconstitutional because it confers a financial benefit upon religious organizations.

Fourth, Section 702 does not authorize the use of government power to coerce an individual's religious choice. The goal of the Religion Clauses is to enable each individual to adopt and practice the religion of his choice—or no religion at all—without interference by the government. *Wallace* v. *Jaffree*, slip op. 11-16; *Wooley* v. *Maynard*, 430 U.S. 705, 714-715 (1977); *Marsh* v. *Chambers*, 463 U.S. at 803 (Brennan, J., dissenting). Section 702 does not enable a religious organization to invoke the authority of government to compel adherence to religious requirements. Section 702 instead is a restriction on the use of government power; government has withdrawn and permitted a religious organization to determine according to the dictates of its faith whether to consider religion in employment decisions.

The district court observed (J.S. App. 70a, 72a-73a) that Section 702 permits a religious organization to use employment opportunities to require adherence to its religious beliefs, and found that effect to be constitutionally impermissible. Of course, the religious organization's ability to coerce its employees is limited. An individual can choose to seek other employment rather than satisfy a religious requirement.[20]

More fundamentally, the particular effect cited by the district court—the fact that a religious organization may influence its employees' religious choices by discriminating in employment on the basis of religion—is not an effect that is relevant under the Establishment Clause because it is not the result of an affirmative grant of authority by Section 702 or any other federal statute. Prior to the enactment of Title VII, *all* private employers were free to dis-

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[20] The statute in *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), was found to violate the Establishment Clause because it had the primary effect of "advanc[ing] a particular religious practice" (472 U.S. at 710)—Sabbath observance—and forced private individuals to accommodate this religious practice without regard to the burden imposed upon those private individuals. The statute required "[t]he employer and others [to] adjust their affairs to the command of the state" and violated the principle that no individual has " 'the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.' " *Ibid.* (citation omitted); see also *id.* at 708 ("Government * * * must take pains not to compel people to act in the name of any religion".). Section 702, by contrast, does not endorse any specific religious practice and does not compel any private individual to conform his conduct to religious requirements. It thus mandates separation between government and religion rather than government intervention with respect to religious concerns.

criminate on the basis of religion; Section 702 simply exempts religious organizations from the antidiscrimination requirement of Title VII.[21] The effect cited by the district court thus flows from the government's decision not to exercise its regulatory authority. Since Congress's failure to prohibit discrimination prior to 1964 did not constitute an establishment of religion, its decision not to prohibit such discrimination now cannot offend the Establishment Clause.

Indeed, the district court's conclusion rests upon reasoning similar to an argument rejected by this Court in *Walz* v. *Tax Commission*, *supra*. The tax exemption in *Walz* was attacked as the equivalent of a direct money subsidy to religious organizations; the Court replied that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees on the public payroll.'" 397 U.S. at 675; see also *id.* at 690 (Brennan, J., concurring) (distinguishing subsidies from exemptions on the ground that "[a] subsidy involves the direct transfer of public monies" while an exemption acts "only passively, by relieving a privately funded venture of the burden of paying taxes"). So, too, here the absence of government regulation must be distinguished from the affirmative invocation of government power. Since Section 702

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[21] The fact that Congress enacted a narrower exemption in 1964 and adopted the broader exemption in 1972 does not alter this analysis. Cf. *Crawford* v. *Los Angeles Board of Education*, 458 U.S. 527 (1982).

constitutes the former rather than the latter, it does not violate the Establishment Clause.[22]

Claims under the Establishment Clause generally require the Court to "reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that * * * total separation of the two is not possible" (*Lynch* v. *Donnelly*, 465 U.S. at 672). Here, however, there is no "inescapable tension" to resolve. The sole effect of Section 702 is to promote the disassociation of government and religion that is the goal of the Religion Clauses. The statute therefore cannot violate the Constitution.[23]

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[22] Rather than stating an effect cognizable under the Establishment Clause, appellees' argument on this point resembles an effort to invoke equal protection principles. Thus, appellees argue (Mot. to Aff. 18) that Congress was not free to draw a distinction between religious employers and other employers. Such a claim relating to Congress's authority to distinguish among groups is more properly addressed under equal protection principles. As we have shown, accommodation of religion is a permissible, indeed a constitutionally sanctioned goal, and a distinction that furthers that goal cannot constitute a denial of equal protection. Since Section 702 effects just such an accommodation (see pages 26-31, *supra*), the statute does not contravene equal protection principles.

[23] Justice O'Connor has suggested that "[i]n assessing the effect of [a statute that lifts a government-imposed burden upon the free exercise of religion]—that is, in determining whether the statute conveys [to an objective observer] the message of endorsement of religion or a particular religious belief—courts should assume that the 'objective observer' is acquainted with the Free Exercise Clause and the values it promotes" (*Wallace* v. *Jaffree*, slip op. 17 (concurring opinion)). Section 702 plainly does not have an impermissible effect under this standard. An objective observer would view the statute as an effort to disassociate government and religion

B. Section 702 Therefore Satisfies The Test Set Forth In *Lemon* v. *Kurtzman*

In *Lemon* v. *Kurtzman*, *supra*, this Court set forth a three-part standard for evaluating claims under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion' " (403 U.S. at 612-613 (citations omitted)). While we have in the past indicated uneasiness with the *Lemon* standard as applied to government accommodations of religion,[24] it is clear that Section 702 satisfies each of these requirements.

First, Section 702 serves a permissible legislative purpose. As we have discussed (see pages 15-17), Congress enacted the exemption in order to avoid government interference with the personnel decisions of religious organizations, thereby furthering religious autonomy. As the district court in this case noted, the "legislative goal of assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions is a valid secular purpose" (J.S. App. 40a).[25]

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and thereby eliminate any possible burden upon a religious organization's ability to act in accordance with the dictates of its faith and its religious identity and mission.

[24] See, *e.g.*, U.S. Br. at 24-30, *Estate of Thornton* v. *Caldor, Inc.*, *supra*.

[25] Appellees contend (Mot. to Aff. 10-11) that Congress's purpose was not to avoid interference in religious affairs because on that rationale it would have completely exempted religious organizations from Title VII; they assert that Congress intended to "invite[] religious employers to coerce reli-

Although the Court has not expressly stated that a statute designed to accommodate religion has a purpose that is permissible under *Lemon*, it has strongly indicated that such a purpose does not violate the Establishment Clause. *Wisconsin* v. *Yoder*, 406 U.S. at 234-235 n.22; *Walz* v. *Tax Commission*, 397 U.S. at 673-674; cf. *Ansonia Board of Education* v. *Philbrook*, No. 85-495 (Nov. 17, 1986). While a narrow reading of the secular purpose requirement might be taken to invalidate any exemption of religious observers from generally applicable governmental obligations, given the underlying purpose to promote the exercise of religion free from government interference (see *Wallace* v. *Jaffree*, slip op. 16 (O'Connor, J., concurring opinion)), such a conclusion would defeat the central aim of the Religion Clauses. The Establishment Clause itself seeks, most fundamentally, to avoid the interference of government with religion, and this Court's decisions make quite clear that a statute designed to avoid interaction of government and religion *furthers* that goal. See pages 18-25, *supra*. The *Lemon* test should be construed to reflect the permissibility of such a legislative purpose.[26]

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gious loyalty through the economic power that employment gives an employer over an employee." As we have discussed (see note 13), Congress could reasonably conclude that its goal of restricting interference in religion could be met by an exemption limited to claims of religious discrimination. Moreover, as the district court found, "there is no indication that Congress amended Section 702 for a religious purpose or to promote religion or religious beliefs" (J.S. App. 40a (footnote omitted)).

[26] A narrow definition of the purposes permissible under the *Lemon* test would tend to the absurd result that an accommodation of religion required by the Free Exercise Clause

Similarly, as to the second prong of the *Lemon* test, the principal effect of Section 702 is to eliminate government interference with religious organizations by excluding them from coverage under regulatory legislation. In particular, the exclusion from Title VII coverage of all employment decisions of religious entities that are based on the employee's religion avoids substantial litigation, frequently culminating in the substitution of a court or agency judgment for that of a church, on a subject often significantly related to religious belief and practice. See pages 26-31, *supra*. That effect must be permissible if the Establishment Clause is not to defeat its own purpose of avoiding entanglement and interference with religion.

Finally, Section 702 does not contravene the third part of the *Lemon* standard because it avoids rather than causes an entanglement of government and religion. The Court observed in *Lemon* that "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority" (403 U.S. at 615).

Although Section 702 arguably benefits religious institutions by freeing them from a legal restriction on their conduct, that fact cannot be dispositive of

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automatically would run afoul of the Establishment Clause because, by definition, the purpose of such an accommodation, is to facilitate the free exercise of religion. In addition to producing such a constitutional impasse, rejection of accommodation as a permissible goal would conflict with this Court's decisions upholding discretionary accommodations of religion (see pages 24-25, *supra*).

the entanglement inquiry without invalidating all accommodations of religion. Moreover, the statutory exemption provides no affirmative aid to religious organizations, but simply reflects government's decision not to regulate one aspect of their activities. Such forbearance minimizes the interaction between government and religion, and thus avoids rather than exacerbates any possible entanglement. As the district court concluded, "Section 702 does not require the type of comprehensive, discriminatory and continuous state or federal surveillance that was condemned in cases such as *Lemon*. * * * [It] ensure[s] that the government and courts do not go through the rigors of inspecting and analyzing whether the activities in which a religious entity is engaging are religious or secular, thus avoiding an intimate and continuing relationship between church and state" (J.S. App. 74a-75a (footnote omitted)).[27]

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[27] The district court found that Section 702 enables religious organizations to exercise "coercive power" over their employees' beliefs and that this conclusion supported a "finding of excessive entanglement" (J.S. App. 74a). As we have discussed, the district court's assessment of the effect of the statute is in error.

We take no position regarding the question presented by the private appellants regarding the availability of a back pay remedy in the circumstances of this case.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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JANUARY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181493 40171

Nos. 86-179 and 86-401

Supreme Court, U.S.
FILED
FEB 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,

—v.—

CHRISTINE J. AMOS, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

—v.—

CHRISTINE J. AMOS, *et al.*,
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FOR THE DISTRICT OF UTAH

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QUESTIONS PRESENTED

1. Whether section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, as amended, violates the Establishment Clause of the First Amendment, as applied to exempt from Title VII liability the private appellants' firing of appellee Mayson for solely religious reasons, when Mayson's job as a building maintenance engineer at a public gymnasium owned by appellants required him to perform only secular tasks, when the activities of the gymnasium are secular, when no sincerely held religious belief of appellants is implicated by the gymnasium's activities or the discriminatory employment practices challenged here, and when the effect of section 702's absolute, unqualified exemption is to invite religious employers to coerce religious loyalty from their secular employees, thus seriously abridging the employees' religious liberty?

2. Whether the district court abused its discretion in concluding that the equities favored an award of back pay to make appellee Mayson whole for the injury he suffered as the result of his employer's unlawful discrimination?*

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* The private parties are identified in the Jurisdictional Statement filed by the private appellants in this case, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, No. 86-179, at page ii.

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IN THE

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OCTOBER TERM, 1986

Nos. 86-179 and 86-401

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,

Appellants,

—v.—

CHRISTINE J. AMOS, *et al.*,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

—v.—

CHRISTINE J. AMOS, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR APPELLEES

The district court correctly held that section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, as amended ("section 702"), is a law respecting an establishment of religion as applied to exempt from Title VII liability appellants, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-Day

Saints (hereinafter "appellants"), for their firing of appellee Arthur Frank Mayson for religious reasons. The judgment in favor of Mayson should be affirmed.

STATEMENT

History of This Litigation

The Deseret Gymnasium ("the Gym") is a public gymnasium located in downtown Salt Lake City. It is a large, freestanding facility not adjacent to or connected with any Mormon school or church. R. II at 148-49.[1] It contains the same facilities as are available in any public gymnasium or health spa, including swimming pools, saunas, steam rooms and whirlpools, basketball, volleyball, racquetball and squash courts, exercise and weight lifting facilities, and a running track. It also contains barber and beauty shops, men's and women's massage salons and a snack bar. R. II at 122-23.

The Gym is open to all members of the public for annual membership fees or for daily or series admission fees. R. II at 122. It solicits public patronage through advertisements on radio, on hotel cable television and in print media. None of the Gym's advertisements contains any religious message or reference to the relationship between the Gym and the Mormon Church. R. XI at 42-44.

Although the Gym is operated on a not-for-profit basis and is tax exempt, its tax exemption is based on its charitable donation of its facilities to certain groups, not on its religious nature. R. I at 92; II at 6, 148-49, 156-57. The Gym's barber and beauty shops, massage salons and snack bar are leased out as profit-making, taxpaying, private concessions. R. II at 123, 157, 186. Sales taxes are collected at the snack bar. Smoking is

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1 Citations to the record are to the volume number and page. The opinions and most of the orders of the district court are reproduced in the Appendix to the Jurisdictional Statement filed by appellants in No. 86-179 (hereinafter cited as "App.").

permitted in the beauty shop and in the women's massage salon. R. II at 123.

Appellee Mayson was hired in December 1964 as assistant building engineer and was promoted in 1972 to building engineer. R. II at 121. As building engineer his duties were to maintain the Gym's physical facilities and equipment and the grounds outside. R. II at 122. Neither Mayson nor any other employee of the Gym is responsible for preaching, teaching or propagating religious doctrine or for performing religious ritual. Employees of the Gym simply perform the same tasks performed by employees of any public gymnasium or health spa. R. XI at 5, 26-28, 68. From December 1964 until the fall of 1980, Mayson had been promoted and received regular and frequent merit increases. His work had always been rated superior or competent. R. II at 124; V at 179.

When Mayson was hired by the Gym, he filled out an application which nowhere referred to any requirement that the applicant be eligible for a "Mormon temple recommend." R. II at 125.[2] In fact, although nominally a member of the Mormon faith, at no time during his life has Mayson been eligible for a temple recommend. R. II at 125-26.[3] No question concerning Mayson's religious beliefs or practices was ever raised until fall 1980, after he had been employed for approximately 16 years at the Gym.[4] At that time he was informed that unless he began to pay a full tithe, regularly attend Sunday services and satisfy the other religious conditions required by the Mormon Church to be eligible for a temple recommend, he

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2 For the definition of a Mormon temple recommend, see Brief for Appellants in No. 86-179 at 4 n.7 (hereinafter "C.P.B. Brief").

3 Appellants' suggestion that Mayson was once eligible for a temple recommend and was fired for failing to "maintain" that eligibility, C.P.B. Brief at 9, is contrary to the record.

4 The government's contention that eligibility for a Mormon temple recommend has been a requirement for employment at the Gym since 1969, U.S. Brief at 5, is false. Appellants admit that the temple eligibility requirement was not imposed at the Gym until 1980. R. XIV at 170-71.

would be fired. Mayson refused to conform his beliefs to the demands of the Gym and was fired on April 10, 1981. At the time of his termination, he was 56 years old. R. II at 124-27.

Throughout Mayson's 16 years at the Gym, ineligible Mormons and non-Mormons worked there in a variety of positions, including lifeguard, janitor and athletic instructor. Shortly before Mayson was fired for failing to become eligible for a temple recommend in April 1981, a non-Mormon was hired to work in the snack bar and remained employed for the next two years. At the same time that Mayson was fired, the Gym continued to employ Gulmast Khan, a non-Mormon, as squash instructor and manager of the pro shop, a position involving substantially more contact with the Gym's patrons than did Mayson's. Immediately after Mayson's right to sue letter issued, the Gym arranged for Khan to resign as an "employee" but immediately rehired him as a "contract worker" to perform the same services he had been performing as an employee. Khan is still employed at the Gym. R. II at 123; XI at 57, 162-63; III at 135-36.[5]

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5 The other plaintiffs below, whose claims are not at issue on this appeal, were employees of Beehive Clothing Mills ("Beehive") and Deseret Industries. Beehive manufactures and distributes garments, underwear worn daily by faithful members of the Mormon Church, and temple clothing worn during worship in Mormon temples. The Beehive plaintiffs, hired between 1971 and 1980, worked as cutters, seamstresses and as a personnel assistant. R. II at 100-02, 108-09, 113-14, 117-18; XIV at 20, 26.

From 1960 until at least after this action was commenced in April 1983, Beehive employed non-Mormons and ineligible Mormons for a variety of tasks, including cutting, sewing and marking garments, and shipping garments and temple clothing. Non-Mormons and ineligible Mormons were also employed in clerical and warehouse positions. At the same time that the Beehive plaintiffs were fired for failure to satisfy the newly imposed temple recommend requirement, non-Mormon employees at Beehive performing the same or similar jobs were retained. R. II at 102; XI at 51-52, 141, 147-58; XXV at 82-92.

Prior to 1960 garments were manufactured by four nonsectarian, commercial companies in the United States. In 1980 and 1981, Beehive again contracted with a number of nonsectarian, commercial companies in Utah and Arizona to manufacture garments. R. XI at 45-46; XXV at 70-71. No religious requirement of any kind was ever imposed

After appellees' Complaint was filed, but before any discovery, appellants moved to dismiss or, alternatively, for summary judgment. They did not dispute the jurisdictional prerequisites to appellees' suit, including that they were "employers" affecting commerce within the meaning of Title VII. 42 U.S.C. § 2000e(b). Their motion was based on the section 702 exemption.

In response to the motion, appellees argued that section 702, as applied, violates the Establishment Clause and the Equal Protection component of the Due Process Clause to the extent it immunizes appellants from Title VII liability for their firing of appellees from secular jobs for an admittedly religious reason. The district court concluded that section 702 violates the Establishment Clause as applied to Mayson. App. 1a-75a.[6]

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on employees of these domestic, nonsectarian companies. R. XI at 49-51.

Currently, at least eight commercial, nonsectarian companies outside the United States, neither owned by nor affiliated with the Mormon Church, manufacture Mormon garments. These include Jockey, Inc. in the Phillipines, and companies in Argentina, Korea, Taiwan, New Zealand, Great Britain, Switzerland and Mexico. R. XVI at 8-12. No religious requirement is imposed on the employees of these companies. R. XI at 49-50. The number of foreign commercial companies involved in garment manufacturing for the Mormon Church has increased from one or two in the late 1970s to the eight currently under contract. R. XI at 45-48. The Mormon Church has chosen to contract with commercial, nonsectarian firms abroad for the manufacture of garments for reasons of economics and expedience. R. XIV at 194; XVI at 13-18.

The last plaintiff below was Ralph Whitaker, a truck driver for Deseret Industries. Deseret Industries manufactures goods and refurbishes goods donated by the public and members of the Mormon Church for sale at its over 50 thrift stores throughout the West, which are open to the general public. R. IV at 165; XIV at 183-85. Whitaker was hired as truck driver in October 1977. In November 1977, Whitaker was excommunicated from the Mormon Church; nevertheless he was retained until early 1983 when he was informed that because he could not be worthy of a temple recommend he would be fired. R. II at 132-33.

6 Appellees urged the district court to examine the jobs they performed to determine whether those jobs had any religious content in

The district court analyzed Mayson's employment at the Gym in light of the essentially undisputed facts set forth in both Mayson's and appellants' affidavits. App. 11a-18a. The court correctly found that appellants made no claim that there was a sincerely held religious belief that members of the Mormon Church must engage in physical exercise and must do so in a gymnasium owned and operated by the Mormon Church or in which all employees are observant Mormons. The court also correctly noted that there was no contention by appellants that the religious tenets of the Mormon Church require religious discrimination in employment. To the contrary, the Mormon Church in applying for one of its numerous broadcast licenses, has represented to the F.C.C. that its policy is that "it is 'morally evil' to deny anyone the right to employment . . . ." *In re Chronicle Broadcasting Co.*, 59 F.C.C.2d 335, 337 (1976). The court then considered the relationship between Mayson's job and the religious beliefs of the Mormon Church. It correctly found that none of Mayson's duties was even tangentially related to any religious belief or ritual of the Mormon Church or church administration. App. 17a-18a. The court's decision with regard to Mayson was made on appellants' motion to dismiss prior to any discovery. The

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order to determine whether the section 702 exemption could be constitutionally applied. *See* App. 9a. However, the district court rejected the job test proposed by appellees, adopting instead a standard more deferential to the hiring preferences of religious organizations. In formulating that more deferential standard, the district court asked three sensible questions: What is the relationship between the employing entity and the financial affairs, day-to-day operations and management of the Mormon Church? What is the relationship between the employing entity and any sincerely held religious belief or rituals of the Mormon Church or church administration? And, what is the relationship between the specific job performed by an employee and any sincerely held religious belief? In instances where the relationship between the employing entity and the finances and management of the Mormon Church was close and substantial and the relationship between the employing entity and sincerely held religious beliefs of the Mormon Church was substantial, the district court stated that it would inquire no further but would conclude that the section 702 exemption was constitutional, as applied, regardless of the specific job at issue. App. 10a.

decision was based entirely on undisputed facts about the administration of the Gym, its operation and activities, its employment practices, its purpose, and Mayson's duties.

Thereafter, both parties conducted some discovery and appellees moved for summary judgment for all the employees and for entry of final judgment for Mayson for reinstatement and back pay. Appellants did not oppose Mayson's request for reinstatement, and the court awarded Mayson back pay, including fringe benefits. App. 116a-120a.[7]

The district court's determination concerning the religious or secular nature of the Gym was made in a summary manner and without trial. The truth of the Mormon Church's religious beliefs has never been at issue. Rather the court accepted at face value appellants' statements regarding doctrine and belief and examined the objectively ascertainable facts concerning the nature of the operations and historical employment practices. That inquiry did not implicate ecclesiastical law, church governance or the relationship between the Mormon Church and its ministers or teachers. The Mormon Church's right to decide who will be its members and its standards for eligibility for temple recommends has never been at issue. *See* App. 52a-53a n.49.

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7 The court *sua sponte* granted summary judgment against Whitaker, the Deseret Industries truck driver, based on the affidavits of appellants establishing a substantial relationship between sincerely held Mormon beliefs and the activities of Deseret Industries. App. 105a-116a. Although appellants suggest that the court's decisions with regard to Mayson, a building engineer, and Whitaker, a truck driver, cannot be reconciled, in fact the difference is the result of the court's more deferential standard than the job test proposed by appellees. Because appellants were able to demonstrate through affidavits a relationship between Deseret Industries and Mormon Church religious beliefs, the court did not consider the nature of Whitaker's individual job.

The claims of the Beehive employees have not yet been resolved because appellants and appellees agreed to defer further proceedings on those claims pending the disposition of this appeal. R. X at 33-34.

Title VII's Treatment of Religion and Religious Employers

An overview of the treatment of religion and religious employers under Title VII focuses the issues raised here. Section 703(a) makes it an unlawful employment practice for an employer to refuse to hire or to discharge any individual because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). In addition to concerns for fairness and equality, Title VII's bar against religious discrimination also promotes the First Amendment's concern for free exercise of religion by protecting employees' religious liberty. *See, e.g.*, 118 Cong.Rec. 705-06 (Jan. 21, 1972) (comments of Sen. Randolph); id., at 706 (comments of Sen. Williams).[8]

Religious employers, like appellants, are not exempt from Title VII's prohibition of discrimination on the basis of race, color, sex or national origin.[9] Since the applicability to religious employers of Title VII's bar against race, sex and national origin discrimination is unqualified under the stat-

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8 In section 701(j), Congress sought to protect the religious liberty of employees by requiring employers reasonably to accommodate their religious observance and practice. 42 U.S.C. § 2000e(j). To avoid Establishment Clause problems, however, this Court has narrowly construed the employer's duty of reasonable accommodation to impose no more than *de minimis* burdens on the employer or other parties. *Ansonia Bd. of Educ. v. Philbrook*, 107 S.Ct. 367 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *see id.*, at 85 (Marshall & Brennan, J.J., dissenting); *Estate of Thornton v. Caldor, Inc.*, 105 S.Ct. 2914, 2919 (1985) (O'Connor & Marshall, J.J., concurring).

9 *See, e.g., E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *Ninth & O Street Baptist Church v. E.E.O.C.*, 616 F.Supp. 1231 (W.D. Ky. 1985), *aff'd mem.* 802 F.2d 459 (6th Cir. 1986); *see Russell v. Belmont College*, 554 F.Supp. 667 (M.D. Tenn. 1982) (Equal Pay Act).

ute,[10] the lower courts have found it necessary to perform some constitutional "fine tuning," holding that Title VII constitutionally cannot be applied to regulate the relationship between a church and its ministers or employees performing minister-like responsibilities.[11] In defining the scope of this exemption for minister-like employees, the Equal Employment Opportunity Commission ("EEOC") and the courts independently analyze the nature of the employer's activities and the nature and degree of religious responsibility of the employee.[12]

Section 703(e)(1) permits all employers to hire on the basis of religion, sex or national origin where the employer can demonstrate that such a characteristic is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." 42 U.S.C. § 2000e-2(e)(1). Appellants have never claimed that religion is a BFOQ for any of the jobs at issue in this litigation.

As originally enacted in 1964, all educational institutions, religious and secular, were exempt from Title VII with respect to their educational activities. *See* 42 U.S.C. § 2000e-1 (1964). And, in a substantially overlapping provision, religious schools are exempt from the prohibition against religious discrimination. 42 U.S.C. § 2000e-2(e)(2). In the 1964 version of section 702, religious employers, other than religious schools, were permitted to employ individuals of a particular religion to perform work connected with the carrying on of their *"religious* activities." 42 U.S.C. § 2000e-1 (1964) (emphasis added).

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10 Section 701(b), 42 U.S.C. § 2000e(b), limits the applicability of Title VII to employers with 15 or more employees. This small-employer exclusion undoubtedly removes from Title VII coverage the employees of many small religious employers and congregational churches.

11 *See Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 3333 (1986); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

12 *See, e.g., E.E.O.C. v. Fremont Christian School, supra; E.E.O.C. v. Pacific Press Pub. Ass'n, supra; E.E.O.C. v. Southwestern Baptist Theological Seminary, supra; E.E.O.C. v. Mississippi College, supra.*

In 1972, Congress removed the blanket exemption from Title VII for educational institutions. It is in that context that the 1972 amendment to section 702 must be understood. The district court's opinion reviews at length the legislative history of the 1972 amendment to section 702 and the comments of its sponsors, Senators Ervin of North Carolina and Allen of Alabama. App. 25a-39a. The legislative history makes clear that the overriding concern of Senators Ervin and Allen was to preserve the blanket exemption from all of Title VII's prohibitions for educational institutions, religious and secular alike.[13]

Although the sponsors of the 1972 amendment to section 702 were concerned about schools, not public gymnasiums, Senator Ervin made two comments which appellants and the government cite to support the broad exemption in the current version of section 702. First, he maintained that "the political hands of Caesar" should be removed from "the institutions of God." 118 Cong.Rec. 4503. That principle, however, would justify a blanket exemption for religious employers that Congress rejected. *See* App. 35a. Second, Senator Ervin argued that the 1964 version of section 702, which limited the exemption to *religious* activities, attempted to do "an impossible thing": separate the "religious" activities of a religious corporation, association or society from its nonreligious or secular activities. 118 Cong.Rec. 1973.[14] The difficulty with Senator

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13 *See King's Garden, Inc. v. F.C.C.*, 498 F.2d 51, 54 n.6 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). The preoccupation of Senators Ervin and Allen with educational institutions, and not other types of activities engaged in by religious employers, is demonstrated by their action the day following Senate approval of Amendment No. 809 on February 21, 1972, which amended § 702 to its current form. On February 22, 1972, Senators Ervin and Allen proposed Amendment No. 844, which would have deleted from § 702 the exemption for religious discrimination by religious employers and substituted for that exemption a blanket exclusion from all of Title VII's prohibitions for "any educational institution." 118 Cong.Rec. 4919.

14 Appellants' suggestion, C.P.B. Brief at 12, that Congress in 1972 was expressing dissatisfaction with the way the EEOC and the courts had interpreted and applied the 1964 version of the § 702 exemption is seriously misleading. Nowhere in the legislative history of the 1972

Ervin's claim that it is impossible to distinguish secular from religious activities is that civil authority must do so with some frequency. *See* pp. 16-24, *infra*.[15]

Soon after the 1972 amendment to section 702, serious questions were raised regarding its constitutionality as applied to the secular activities of religious employers. In *King's Garden, Inc. v. F.C.C.*, 498 F.2d 51 (D. C. Cir.), *cert. denied*, 419 U.S. 996 (1974), the court of appeals refused to require the FCC to rewrite its rules prohibiting religious discrimination by religious licensees except with respect to jobs involving the espousal of religious views to conform to the broader exemption in section 702 because section 702 "is of very doubtful constitutionality" under the Establishment Clause. *Id.*, at 53. That was so, the *King's Garden* court believed, because section 702 invites religious discrimination by religious employers in activities and enterprises where there is no First Amendment justification for such discrimination. *Id.*, at 54-57.[16]

Even without the unbounded exemption for religious discrimination in secular as well as religious activities contained in section 702, Title VII's exclusion of employers with less than

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amendment is there reference to any actual proceeding under § 702. That is not surprising. A review of United States Code Annotated reveals no cases involving religious discrimination arising under the 1964 version of the § 702 exemption. The only reported case to even construe the 1964 version of § 702 is *McClure v. Salvation Army*, *supra*, which involved a claim of sex, not religious, discrimination.

15 Senator Ervin supported this claim by reference to an unidentified opinion of Justice Douglas. 118 Cong.Rec. 1973. The only such opinion of which appellees are aware is the dissent in *Board of Educ. v. Allen*, 392 U.S. 236, 255-58 (1968), where Justice Douglas questions the ability of school board officials to distinguish between religious and secular textbooks. The *Allen* majority, of course, rejected Justice Douglas' position. *Id.*, at 244-45.

16 *See Feldstein v. Christian Science Monitor*, 555 F.Supp. 974, 978-79 (D. Mass. 1983) (§ 702 unconstitutional as applied to secular activities of religious employers) (dictum); Bagni, *Discrimination in the Name of the Lord: A Critical Examination of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514, 1548 (1979) (§ 702 violates Establishment Clause).

15 employees, the separate exemption in section 703(e) for religious schools, the judicially created exemption for minister-like employees, and the religious BFOQ provision provide significant "breathing space" protecting the legitimate interests of religious employers in imposing religious qualifications on their employees. Those provisions, together with the 1964 version of section 702, were more than adequate to protect the First Amendment rights of religious employers.

SUMMARY OF ARGUMENT[17]

For 16 years appellee Frank Mayson worked as a building maintenance engineer at the Gym, which, during all that time, employed and served both Mormons and non-Mormons. In 1980, Mayson was informed for the first time that to keep his job he would have to satisfy a religious requirement. Believing that his employer had no business imposing religious conditions on his continuing employment at a public gymnasium, Mayson resisted his employer's attempt to coerce his religious beliefs and practices. In 1981, Mayson was fired solely for failure to satisfy his employer's newly imposed temple recommend requirement. Since Mayson was fired, his employer has continued to employ non-Mormons at the Gym and to sell its services to the general public.

Title VII forbids employment discrimination on the basis of religion. The bar against religious discrimination vindicates not only the strong national commitment to equal employment opportunity; it also vindicates the First Amendment's guarantee of religious liberty. Congress in 1964 gave religious employers a partial exemption from the ban on religious discrimination for their religious activities. The careful balance between the rights of religious employers and their employees struck by Congress in the 1964 version of section 702 was unconstitutionally upset in 1972 when Congress amended sec-

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17 Appellees take no position on the question of this Court's jurisdiction.

tion 702 to give religious employers an absolute, unqualified exemption from the ban on religious discrimination for all of their activities, secular or religious.

As applied to exempt the firing of Mayson from Title VII's bar against religious discrimination, section 702 violates the Establishment Clause. The unbounded section 702 exemption is not required to protect the constitutional rights of religious employers. In particular, the Free Exercise Clause does not require the accommodation of a religious employer's inconsistently applied preference to discriminate against employees like Mayson working in a public gymnasium. Application of Title VII to religious employers does not violate the Establishment Clause. This Court has never struck down under the Establishment Clause a generally applicable regulatory burden and the courts have repeatedly sustained the application of important labor laws to religious employers. Determination by civil authority as to whether an activity or a job is religious or secular, for the purpose of applying Title VII, may require some sensitivity. But that determination is neither unprecedented nor so constitutionally problematic as to justify a "broad prophylactic exemption," U.S. Brief at 27, where important rights of other parties are at stake.

Congress' purpose to wholly subordinate the rights of employees to accommodate the preferences of religious employers crossed the line between permissible accommodation and impermissible encouragement and endorsement of religion. The most glaring unconstitutional effect of the unbounded section 702 exemption is its absolute accommodation of religious employers while imposing substantial costs on employees and impermissible burdens on their religious liberty. The Establishment Clause forbids accommodation so directly and significantly burdening the religious liberty of others. Other effects of the unbounded section 702 exemption similarly require its condemnation. Section 702 encourages religious employers to expand their influence in the secular economy while coercing religious obedience from secular employees through economic power. This coercive power gives religious employers competi-

tive secular advantages over nonreligious employers. Section 702 also impermissibly delegates to religious employers governmental power to effectively nullify or veto important labor law rights which their employees are supposed to enjoy.

In a proper exercise of discretion, the district court correctly concluded that appellee Mayson should be made whole through a back pay award for the injuries he suffered due to his employer's discrimination. Granting back pay to Mayson will have a *de minimis* effect on appellants; denying it will substantially injure Mayson. Good faith is not a defense to back pay under Title VII. Reliance on a permissive, constitutionally doubtful exemption should not defeat Title VII's make-whole purpose.

ARGUMENT

I.

SECTION 702, AS APPLIED TO MAYSON, VIOLATES THE ESTABLISHMENT CLAUSE

A. The Broad Exemption Contained In Section 702 Is Not Constitutionally Required

1. Unless required by the Free Exercise Clause, "an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause . . . ." *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). In *Yoder*, a religious exemption was granted upon a showing that the exemption was required to avoid a severely adverse impact upon a sincerely held religious belief vital to the continued survival of the Amish religious community. *Id.*, at 235. The government correctly concedes that the broad section 702 exemption is not required by the Free Exercise Clause. U.S. Brief at 17.

When compared to the showing required by *Yoder*, appellants' claim that the Free Exercise Clause requires an exemption from Title VII to permit the religious discrimination

practiced against Mayson is clearly without merit. It is not the case now, nor has it been at any time relevant to this litigation, that the Mormon Church in its non-profit activities "employs only its members who are eligible for a 'temple recommend.' " C.P.B. Brief at 4. Throughout Mayson's employment at the Gym, ineligible Mormons and non-Mormons were employed there also. Shortly before Mayson was fired, a non-Mormon was hired. Both before and after Mayson's firing, the non-Mormon squash instructor has worked at the Gym. The lower court's decision will not force the Mormon Church to use donated monies to pay salaries of those who do not meet its standards when it would not otherwise do so. The Mormon Church has paid and continues to pay Khan (although in an effort to create a facade of consistency, it now pays him as a "contract worker" instead of as an employee).

Although appellants invoke the 1910 dedicatory prayer to the original Deseret Gymnasium facility, the present Gym is not a facility where the "moral and health standards" of the Mormon Church are observed. Smoking is permitted in portions of the Gym. Nor is the Gym a community of Mormon believers. By choice, the Gym advertises for and accepts non-Mormons as paying members. Despite appellants' invocation of the dedicatory prayer and early church writings which claim that athletic instruction will be by "faithful teachers" and "our own people," the Gym has employed and continues to employ non-Mormon instructors.[18]

Appellants argue that their inconsistent hiring practices are "consistent with" a number of religious beliefs. C.P.B. Brief at 20. All of the Mormon Church's activities, whether for-profit or not-for-profit, are no doubt "consistent with" its religious beliefs. However, the most that appellants can show is an inconsistently applied preference for hiring "templeworthy"

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18 Appellants concede that the particular religious test which they have chosen to employ, eligibility for a temple recommend, is not based upon a religious belief that only those so qualifying can be employed at the Gym. Rather they have chosen eligibility because it is "administratively convenient." C.P.B. Brief at 4 n.7.

Mormons.[19] A practice undertaken as a matter of preference is an inadequate substitute in free exercise analysis for one required by "deep religious conviction." *Wisconsin v. Yoder*, *supra*, 406 U.S. at 216; *see Goldman v. Weinberger*, 106 S.Ct. 1310, 1317 (1986) (Brennan & Marshall, J.J., dissenting) (mere preferences not constitutionally protected).

The appropriate constitutional test where a religiously affiliated institution claims an exemption based on the Free Exercise Clause is the impact of the challenged regulation on a sincerely held religious belief, not the impact of the regulation on the operation of the institution. *E.E.O.C. v. Pacific Press Pub. Ass'n*, *supra*, 676 F.2d at 1280. In this case the requirement that the Gym refrain from religious discrimination in its employment practices will have no impact on any sincerely held religious belief. *See In re Chronicle Broadcasting, supra*. It will not even effect a change in the operation of the Gym, as non-Mormons have been and are employed there.

2. Appellants suggest that section 702 as originally written—and by implication the determination the district court made here—was "constitutionally untenable" because it required the courts to distinguish between the secular and religious activities of religious organizations, thereby excessively entangling government in religion. That assertion is without basis in this Court's cases defining the scope of the Establishment Clause. Administrative agencies and the courts are frequently required to determine whether an activity is religious or secular for the purpose of determining the scope of a regulatory exemption. Such a determination is both necessary and constitutional. *See Wisconsin v. Yoder*, *supra*, 406 U.S. at 240-41 (White, J., concurring).

In *Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985), for example, this Court upheld administrative

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19 The Mormon Church is perfectly satisfied to have non-Mormons who have been employed by Beehive and by commercial, nonsectarian firms perform the same garment manufacturing operations that the Beehive plaintiffs performed before they were fired.

and judicial inquiry into the secular or religious nature of the activities of religious organizations. The Alamo Foundation, actively engaged in evangelism and recognized by the IRS as a religious and charitable institution under 26 U.S.C. § 501(c)(3), contended that the First Amendment prohibited application of the Fair Labor Standards Act to some 300 "associates" who worked in commercial operations run by the Foundation because those activities were "infused with a religious purpose." 471 U.S. at 298. The Foundation argued that the businesses ministered to the needs of its associates by providing them with opportunities for rehabilitation as well as food, clothing and shelter, and that the businesses were "churches in disguise," vehicles for preaching and spreading the gospel. *Id.*, at 298-99. This Court rejected the Foundation's argument:

> The lower courts clearly took account of the religious aspects of the Foundation's endeavors, and were correct in scrutinizing the activities at issue by reference to objectively ascertainable facts concerning their nature and scope.

Id., at 299.

Appellants cite *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), for the proposition that civil inquiry into the religious nature of an institution could, by itself, so entangle government in religion that it would violate the Establishment Clause. But this Court in *Catholic Bishop* itself independently analyzed the "substantial religious character" of the parochial schools at issue and the "unique" religious responsibilities of parochial school teachers before concluding, as a matter of statutory construction, that application of the National Labor Relations Act to parochial schools would raise serious questions under both the Free Exercise and the Establishment Clauses. *Id.*, at 501-04.

This Court's decision in *Catholic Bishop* has necessitated the very line drawing which appellants claim to be impermissible. Since *Catholic Bishop*, the courts of appeals have reviewed a

wide range of church-operated, religiously motivated activities to determine whether the Labor Board has jurisdiction over them. These cases have required the courts to determine independently whether the activities are religious or secular. The courts of appeals have consistently sustained the Board's jurisdiction over the activities of religious employers other than religious schools.[20]

The provisions of the Internal Revenue Code cited by the government for the proposition that religious exemptions are permissible, U.S. Brief at 26 n.12, reinforce the conclusion that civil inquiry into the secular or religious nature of a religious organization's activities is constitutionally proper. For instance, the exemption from unemployment tax contained in section 3309(b) requires a determination by the IRS and the courts whether the organization is operated "primarily for religious purposes." Similarly, the exemption from informational return filing requirements contained in section 6033(a)(2)(A) requires the IRS and the courts to determine

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20 *Volunteers of America-Los Angeles v. N.L.R.B.*, 777 F.2d 1386, 1390 (9th Cir. 1985) (NLRB has jurisdiction over church-run alcohol treatment services where program is "expressive of a religious philosophy but . . . carried out in a secular fashion"); *N.L.R.B. v. Salvation Army of Mass.*, 763 F.2d 1, 6 (1st Cir. 1985) (NLRB has jurisdiction over church-run day care center where program "fulfills [a] religious mission" but "whose operation is indistinguishable from that of secular day care centers"); *Volunteers of America-Minnesota v. N.L.R.B.*, 752 F.2d 345, 348 (8th Cir.). *cert. denied*, 105 S.Ct. 3502 (1985) (NLRB has jurisdiction over church-owned residential treatment center which is "vehicle for missionary activities, but . . . resembles a secular institution in critical respects"); *Denver Post of the Nat'l Soc'y of the Volunteers of America v. N.L.R.B.*, 732 F.2d 769, 772 (10th Cir. 1984) (NLRB has jurisdiction over employees of religious organization's temporary shelter and counseling programs where "despite the religious purposes underlying these programs, they function in essentially a secular fashion"); *St. Elizabeth's Community Hospital v. N.L.R.B.*, 708 F.2d 1436 (9th Cir. 1983) (NLRB has jurisdiction over employees of religious hospital); *Tressler Lutheran Home for Children v. N.L.R.B.*, 677 F.2d 302 (3d Cir. 1982) (NLRB has jurisdiction over employees of religious nursing home); *N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (NLRB has jurisdiction over church-operated home for neglected children).

whether an activity of a religious order is "exclusively religious." *See Tennessee Baptist Children's Homes, Inc. v. United States*, 604 F.Supp. 210 (M. D. Tenn. 1984), *aff'd* 790 F.2d 534 (6th Cir. 1986).

Similar line drawing must occur when individuals assert their right under Title VII to be free of racial or sexual discrimination, and the religious employer claims that the individual is employed in a minister-like position. In *McClure v. Salvation Army*, *supra*, the court analyzed the activities of the Salvation Army and the duties of the complaining party before concluding that Title Vll's prohibition of sex discrimination could not constitutionally be applied to the Salvation Army's treatment of plaintiff because plaintiff was functioning as a minister within a church. *See Rayburn v. General Conf. of Seventh-Day Adventists*, *supra*.

In subsequent cases, the EEOC and the courts have been required to assess claims by a variety of religious organizations to the kind of blanket exemption accorded to the Salvation Army's relationship with the plaintiff in *McClure*. In *E.E.O.C. v. Mississippi College*, *supra*, the Fifth Circuit analyzed the religious nature of the college and the religious content of the jobs held by its faculty before concluding that the *McClure* exemption should not apply to the college's faculty and staff. Using the same type of analysis, in *E.E.O.C. v. Southwestern Baptist Theological Seminary*, *supra*, the court determined that the seminary's faculty, none of whom taught wholly secular courses, were ministers in the *McClure* sense and thus exempt. However, despite the seminary's claim that all its employees were "ministers," the court determined that neither the support staff nor the administrators involved primarily in finance and other non-academic departments performed minister-like functions and thus they were not exempt from Title VII.

> While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such designation does not control their extra-religious legal status.

651 F.2d at 283. The Ninth Circuit employed a similar analysis in *E.E.O.C. v. Pacific Press Pub. Ass'n*, *supra*, when it determined that the complaining party's secretarial work in a religious publishing house was subject to Title VII's prohibition of sex discrimination and retaliation. *See E.E.O.C. v. Fremont Christian School*, *supra*.

The courts must and do draw similar lines without offending the Constitution in a variety of other contexts.[21] *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973), for example, upheld the government's denial of tax exempt status to a nonprofit religious corporation which presented weekly religious radio and television broadcasts and published a monthly magazine. The IRS had revoked plaintiff's tax exempt status because it considered plaintiff's broadcasts and publications to be political and designed to influence legislation. The Tenth Circuit rejected the district court's position that because plaintiff believed in the religious nature of its activities, neither the IRS nor the court could inquire into those activities to determine whether they were religious or political, and affirmed the IRS' determination that, for purposes of the federal tax laws, plaintiff's activities were political. *Id.*, at 856. *See Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 246 n.18 (4th Cir. 1984) (court must draw line between religious and secular activities of sectarian day care centers to determine

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21 This Court has endorsed line drawing between the religious and the secular in cases invoiving challenges to aid to sectarian schools. State officials may determine whether textbooks are religious or secular without violating the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 403 (1983); *Board of Educ. v. Allen*, *supra*, 392 U.S. at 245. Courts may determine whether educational institutions are "pervasively sectarian" or "essentially secular." *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736, 755-62 (1976). And government officials may determine whether parochial school facilities built with government funds are used exclusively for secular education. *Hunt v. McNair*, 413 U.S. 734, 744-45 (1973); *Tilton v. Richardson*, 403 U.S. 672, 675, 680-82 (1971). *See Aguilar v. Felton*, 105 S.Ct. 3232, 3237-38 (1985); *Grand Rapids School Dist. v. Ball*, 105 S.Ct. 3216, 3223 & n.6 (1985).

scope of constitutionally permissible exemption from state regulation); *United States v. Moon*, 718 F.2d 1210, 1226-28 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984) (for purposes of criminal tax fraud prosecution, court has power independently to analyze a church's activities regardless of how church characterizes those activities); *S.E.C. v. World Radio Mission, Inc.*, 544 F.2d 535 (1st Cir. 1976) (conduct, although religiously motivated, not exempt from federal securities laws); *see also United Methodist Council v. Superior Court*, 439 U.S. 1369, 1372 (Rehnquist, Circuit Justice, 1978).[22]

Religious organizations may believe whatever they wish and, for their internal purposes, they may characterize their activities and their employees as they wish. But, for purposes of determining the applicability of governmental regulations and exemptions therefrom, civil authority must have the power independently to analyze and characterize as religious or secular the activities of religious groups. If administrative agencies and courts do not have that power, religious groups would be above the law. That is not the law. *Tony & Susan Alamo Foundation*, *supra*; *Wisconsin v. Yoder*, *supra*, 406 U.S. at 215-16; *E.E.O.C. v. Southwestern Baptist Theological Seminary*, *supra*, 651 F.2d at 283; *Christian Echoes National Ministry, Inc. v. United States*, *supra*, 470 F.2d at 856-57.

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22 The application of Title VII to religious employers does not result in excessive entanglement. *E.g., E.E.O.C. v. Pacific Press Pub. Ass'n*, *supra*. The EEOC cannot issue coercive orders and lacks independent authority to initiate actions to enforce Title VII, but must wait until an employee initiates action by filing charges with the Commission. The remedies available under Title VII do not result in continuous supervision of pervasively sectarian institutions of the kind this Court sought to avoid in *Catholic Bishop*. This Court has authorized far more extensive supervision than results from amenity to suit under Title VII. In *Tony & Susan Alamo Foundation*, *supra*, the Court rejected a religious organization's argument that the recordkeeping and reporting requirements of the Fair Labor Standards Act constituted excessive entanglement. The potential for ongoing supervision is a good deal greater under the Fair Labor Standards Act than under Title VII because the Secretary of Labor, under the FLSA, can initiate actions whether or not individual employees choose to complain. *See Tony & Susan Alamo Foundation*, *supra*.

Appellants correctly note that this Court has rejected "simplistic" and "absolutist" approaches under the Establishment Clause. C.P.B. Brief at 25, *quoting Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Ignoring that lesson, appellants advance a simplistic and limitless formula for religious accommodation by exemption. First, all accommodation of religion by exemption would be deemed to have a proper purpose. Second, any religious exemption with a proper purpose (by definition all exemptions) would be deemed to have a proper effect if less entangling than nonexemption. C.P.B. Brief at 26, 29-38; *see* U.S. Brief at 22-23. In any regulatory context, exemption always will be less entangling than nonexemption.

This proposal would eviscerate the Religion Clauses. First, it provides no meaningful limits. With no requirement of an impact on sincerely held beliefs, religious exemptions from all labor, health and public welfare statutes, civil and criminal, nonetheless would be constitutional. Religious groups could be exempted from noise ordinances, fire regulations, sanitation, safety and environmental codes despite the obvious benefits and subsidies such exemptions would give to religious groups and the clear, substantial burdens, disadvantages and dangers to which such exemptions would subject third parties.

Second, appellants' accommodation proposal erroneously presumes that "entanglement" between church and state through a generally applicable regulation, or "inhibition" of religious employers through such regulation, is constitutionally problematic under the Establishment Clause. The imposition of a neutral regulatory burden on religious groups or individuals in particular cases may violate the Free Exercise Clause. But this Court has never invalidated such a burden under the Establishment Clause.[23]

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23 *See* Choper, *The Religious Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 682-83 (1980); Riggs, *Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment By Inhibition*, 18 Val. U. L. Rev. 285 (1984); Note, *Equal Employment or Excessive Entanglement? The Application of Employment Discrimination Statutes to Religiously Affiliated Organizations*, 18 Conn. L. Rev. 581, 605-08 (1986).

It is not surprising that the precedents from which appellants attempt to construct this simplistic edifice, *Walz v. Tax Commission*, 397 U.S. 664 (1970), and *Gillette v. United States*, 401 U.S. 437 (1971), will not support it. *Walz* sustained religious property tax exemptions because of the confluence of several factors, most of which are lacking here: most significantly, the exemption was not confined to religious property, 397 U.S. at 672-73, and there has been a long historical tradition of exempting religious, along with charitable and educational property, from property tax, *id.*, at 676-78; *see id.*, at 681-87 (Brennan, J., concurring). *Gillette* followed *Welsh v. United States*, 398 U.S. 333 (1970), which, to avoid Establishment Clause problems, read out of section 6(j) of the Universal Military Training and Service Act the requirement that conscientious objection be religiously based.[24]

Most fundamentally, *Walz* and *Gillette* are poor guides to decision here because in neither of those cases did the exemption at issue impose direct and obvious burdens on the religious liberty of others. Nonexempt property owners may pay more tax because charitable, educational and religious properties are exempt. But the religious liberty of property tax payers is not thereby infringed. Similarly, individuals who do not have a religious (or "ethical" or "moral," *Welsh*, *supra*), objection to war must satisfy a grave obligation of citizenship, but exempting from military service those who have a religious-moral-ethical objection does not burden the religious liberty of those who do not. *See* Choper, *supra*, at 694, 698.

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24 Appellants' claim, C.P.B. Brief at 32, that "the greater potential for entanglement raised by petitioners' claim to an exemption for particular wars . . . was thus a dispositive consideration" in the Court's rejection of the Establishment Clause challenge in *Gillette*, is a gross oversimplification. Viewed as it must be in the context of the controversial war in Southeast Asia, *Gillette's* rejection of conscientious objector status for those who objected only to a particular war principally rested on the serious impact recognition of petitioners' claim would have had on the government's ability to raise armies, 401 U.S. at 455, and the risk of discriminatory application in favor of the "more articulate, better educated, or better counseled." *Id.*, at 457.

As religious organizations move increasingly into economic, social and political spheres—where their activities inevitably impact the rights of others—the granting of blanket religious exemptions from all regulatory burdens simply to minimize "entanglement" is both untenable and unconstitutional. The district court's conclusion that civil authority can and must distinguish between religious and secular activities for purposes of Title VII's ban on religious discrimination is constitutionally sound. Such a distinction must be drawn to avoid unconstitutional applications of the section 702 exemption.

B. Congress' Purpose To Accommodate the Preferences of Religious Employers Through the Absolute Section 702 Exemption Is Impermissibly Sectarian

Section 702's absolute, unqualified exemption for religious discrimination by religious employers is not required to avoid unconstitutional entanglement between church and state nor to avoid burdens of a constitutional magnitude on the free exercise rights of religious employers. The 1964 version of the section 702 exemption, together with Title VII's other provisions dealing with religion, provided more than sufficient accommodation of the legitimate interests of religious employers.

To satisfy the Establishment Clause, Congress must act with a secular purpose. *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Congress' purpose in enacting the 1972 amendment to section 702 crossed the line between permissible accommodation and impermissible encouragement of coercive religious discrimination. The preexisting state of the law provided adequate protection for religious employers. No state created burden on genuine free exercise rights needed to be lifted. *See Wallace v. Jaffree, supra*, 472 U.S. at 57-58 n.45; *Forest Hills Early Learning Center, Inc. v. Lukhard, supra*, 728 F.2d at 237-44.

At the same time, the section 702 exemption "invites religious groups, and them alone, to impress a test of faith on job

categories, and indeed whole enterprises, having nothing to do with the exercise of religion." *King's Garden, Inc. v. F.C.C.*, *supra*, 498 F.2d at 55; *see Feldstein v. Christian Science Monitor*, *supra*, 555 F. Supp. at 979. This invitation to religious employers to expand their influence in the secular economy, while seriously burdening the religious liberty of their secular employees, goes beyond a purpose of reasonable accommodation to one of encouragement and endorsement of coercive religious discrimination. That purpose is improper.

C. The Effects of Section 702's Absolute, Unqualified Exemption Unconstitutionally Advance Religion

Even if a "reluctan[ce] to attribute unconstitutional motives" to Congress, *see Wallace v. Jaffree*, *supra*, 472 U.S. at 66 (Powell, J., concurring), leads this Court to conclude, with the district court, that Congress' purpose was sufficiently secular, the effect of section 702 is to advance religion in several unconstitutional ways.[25]

1. Section 702 Permits Religious Employers to Coerce Religious Loyalty Through Economic Power and Substantially Burdens the Religious Liberty of Employees

As the facts of this case demonstrate, section 702 permits religious employers to advance religion by coercing religious loyalty from secular employees through economic power. Appellants used this power to threaten Mayson and the Beehive employees with the loss of their jobs unless they attended church and paid tithing. This ultimatum was enforced against these long time employees, whose job performances had never been questioned, at the same time that non-Mormons employed at the Gym and Beehive Clothing Mills were retained, but not similarly threatened. A religious employer's ability to

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25 A secular purpose does not save a statute when its effect is to advance religion. *Estate of Thornton v. Caldor, Inc.*, *supra*; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788-89 (1973).

coerce religious loyalty and obedience from its secular employees through economic power is an unconstitutional effect.[26]

Section 702 enabled the employer in this case to enforce church attendance, tithing requirements, adherence to standards of personal and social behavior, and agreement—or at least acquiescence—to all statements of doctrine on pain of termination from secular employment.[27] In *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952), Justice Douglas wrote for the Court:

> We sponsor an attitude on the part of government that . . . lets each [religious group] flourish according to the zeal of its adherents and the appeal of its dogma.

That is precisely what section 702 does not do. Rather than letting each religion flourish according to the zeal of its adherents and the appeal of its dogma, section 702 invites religions to flourish through the economic coercion they can exercise over employees. This coercive method of advancing

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26 The fact that the coercion is not attributable to the state directly does not render the effect constitutional. "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . . ." *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Abington School District v. Schempp*, 374 U.S. 203, 221, 223 (1963).

27 The way appellants imposed the temple recommend requirement on employees at the Gym and Beehive demonstrates its coercive effect on religious belief and practice. Between 1980 and 1982, appellants, without their employees' consent, contacted Mormon religious authorities, and determined which of their employees were eligible for a temple recommend. R. II at 104, 110, 114, 118-19, 124; XIV at 173. This "temple worthiness" check revealed a large number of employees were not eligible. R. XI at 51-52, 57, 147-58, 162-63. Employees who were nominally members of the Mormon Church but not eligible were then told by their employer that they had a few months to become eligible or they would be fired. R. XIV at 173. A number of non-Mormon employees were not similarly threatened. R. XI at 51-52, 57, 158, 163.

Appellees were unwilling or unable to comply and they, along with several other ineligible employees, were fired. An even larger number of ineligible employees succumbed to the economic pressure. R. XI at 51-52, 57, 147-58, 162-63. Indeed, at least one Beehive employee submitted to baptism to keep her job. R. XXV at 94-96.

religion is at war with the spirit and intent of the First Amendment and represents an impermissible benefit to religious employers.

The unbounded section 702 exemption gives absolute accommodation to the interests and preferences of religious employers by imposing a direct, substantial burden on the religious liberty of employees, such as Mayson. In *Estate of Thornton v. Caldor, Inc., supra*, this Court held unconstitutional under the Establishment Clause a state statute which granted an exemption from the rule of employment-at-will by providing employees with the absolute, unqualified right to a day off on their designated Sabbath without fear of termination. The statute was condemned because its accommodation of religion was absolute and unqualified, taking no account of the burdens such accommodation placed on employers or other employees, 105 S.Ct. at 2918, and because the statute gave "Sabbath observers the valuable right to designate a particular weekly day off . . . [while] [o]ther employees who have strong and legitimate, but non-religious reasons for wanting a weekend day off have no rights under the statute." *Id.*, at 2918 n.9.[28]

Thornton's prohibition against absolute and unqualified accommodation of religion at the expense of the rights of third

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28 *Thornton* cannot be distinguished on the basis that it involved denominational discrimination. If discrimination among religious sects or practices had been the Connecticut statute's principal vice, this Court presumably would have employed the equal protection analysis of *Larson v. Valente*, 456 U.S. 228 (1982), rather than the standard Establishment Clause analysis of *Lemon v. Kurtzman, supra*. Further, there would be no need for the Court to emphasize that other employees with *nonreligious* reasons for wanting a weekend day off had no rights under the statute. 105 S.Ct. at 2918 n.9. Finally, then Solicitor General Lee, for the United States, went to great lengths to argue that the Connecticut statute did not discriminate among religious sects. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *Estate of Thornton v. Caldor, Inc.*, O.T. 1983, No. 83-1158, at 7 n.11, 9, 9.

parties does not stand alone. To avoid Establishment Clause problems, this Court has narrowly construed the duty of reasonable accommodation under section 701(j) of Title VII so as not to impose more than *de minimis* costs on employers and other employees. *Trans World Airlines, Inc. v. Hardison, supra*. In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court emphasized that granting Sherbert an exemption from South Carolina's unemployment compensation rules did not violate the Establishment Clause because recognizing her right to benefits did not "abridge any other person's religious liberties." *Id.*, at 409. *See Thomas v. Review Board*, 450 U.S. 707 (1981). Conversely, in *United States v. Lee*, 455 U.S. 252, 261 (1982), this Court denied an Amish employer's claim for a religious exemption from the obligation to pay social security taxes for his employees in part because granting such an exemption would "impose the employer's religious faith on the employees."[29]

As applied to employees like Mayson, section 702 is more clearly unconstitutional than the law condemned in *Thornton*. Section 702 is not required to protect the free exercise rights of religious employers. *Compare Wisconsin v. Yoder, supra*. Its accommodation of their preference to discriminate on the basis of religion is absolute and unqualified. The rights of other parties—the employees—are given no weight. Indeed, those

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29 The government points to certain religious exemptions in the Internal Revenue Code. Their existence has little relevance to the constitutionality of § 702. Sections 512(b)(12) and (15) of the IRC merely provide refinements to the taxation of unrelated business income of organizations otherwise exempt from taxation under § 501(c)(3). That exemption, of course, sweeps more broadly than merely religious corporations, including also charitable and educational corporations. *See Walz v. Tax Commission, supra*, 397 U.S. at 672-73. Moreover, the § 501(c)(3) exemption does not burden the religious liberty of others. The exemption from unemployment tax contained in § 3309(b) is also broader than merely a religious exemption and it does not infringe upon the religious liberty of employees. Finally, the exemption from informational return filing requirements contained in § 6033(a)(2)(A) also is broader than simply a religious exemption and it imposes no burden on religious liberty.

rights are intentionally sacrificed. In *Thornton*, the burdens on third parties were economic and secular. Here, not only did Mayson suffer substantial economic injury; his religious liberty also was significantly infringed.[30] The Establishment Clause condemns religious accommodation at so serious a cost to the religious liberty of others.[31]

2. Section 702 Impermissibly Gives Religious Employers Competitive Advantages Over Nonreligious Employers

Appellants have used the power section 702 gives them to extract from their employees religious obedience and substantial economic concessions. One of the religious requirements imposed on appellees and a principal reason for the termination of all of them was noncompliance with the Mormon Church's tithing requirement. *See* R. II at 104, 111, 124-25; XIX at 9-10; XXI at 8-11; XXVII at 10-12; XXVIII at 14.

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30 In arguing that the Connecticut statute in *Thornton* was constitutional, the United States emphasized that no third party's "*religious* rights or interests are infringed by the statute." Brief of the United States As Amicus Curiae Supporting Petitioner, *Estate of Thornton v. Caldor, Inc.*, O.T. 1983, No. 83-1158, at 23 (emphasis in original).

Several commentators who have struggled to define the extent of permissible accommodation of religion under the Establishment Clause have concluded that accommodation burdening the religious liberty of others is unconstitutional. Choper, *supra*, at 695; McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 34-39; Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach To Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 340-41 (1986).

31 In none of the cases where this Court has sustained an exemption to accommodate religion or where one or more Justices have suggested that such an exemption would be permissible has the exemption imposed a substantial burden on the religious liberty of others. *See Bowen v. Roy*, 106 S.Ct. 2147, 2158 n.19 (1986) (opinion of Burger, C.J.); *Goldman v. Weinberger, supra; United States v. Lee, supra*, 455 U.S. at 260-61; *Thomas v. Review Bd., supra; Trans World Airlines Inc. v. Hardison, supra*, 432 U.S. at 90-97 (Marshall & Brennan, J.J., dissenting); *Gillette v. United States, supra*; *Wisconsin v. Yoder, supra*, 406 U.S. at 230-34; *Walz v. Tax Commission, supra*; *Sherbert v. Verner, supra*, 374 U.S. at 409; *Braunfeld v. Brown*, 366 U.S. 599, 608-09 (1961). *Cf. Wygant v. Jackson Bd. of Educ.*, 106 S.Ct. 1842 (1986).

Appellees have never questioned the Mormon Church's right to impose a tithing requirement—or any other requirement—as a condition of church membership. However, permitting appellants to impose such a requirement as a condition of employment on all of their employees, as section 702 does here, plainly and impermissibly advances religion.

An employer's ability to coerce the return of ten percent of an employee's gross income gives church-owned businesses a competitive advantage over nonreligious businesses. As the district court has found with respect to the Gym, it

> is open to the public for annual membership fees or for daily or series admission fees. It offers the same facilities and services that are available in other gymnasiums, and the employees perform the same jobs that are performed at any public gymnasium or athletic club.

App. 14a-15a (footnote omitted). Section 702 thus impermissibly advantages the Gym, vis-a-vis competing non-church owned gymnasiums.[32] *See Tony & Susan Alamo Foundation, supra*, 471 U.S. at 299 (rejecting a religious employer's claim for exemption from minimum wage laws because "the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of 'unfair method of competition' that [the Fair Labor Standards] Act was intended to prevent, . . . and

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32 In addition to the economic advantage § 702 gives religious employers who impose a tithing requirement, § 702 provides religious employers with a competitive advantage in maintaining the productivity and discipline of their employees. One of the reasons advanced by the Mormon Church for the imposition of the religious requirement is that it gives "all . . . Church activities the advantage of a committed, loyal work force." U. S. Brief at 6. Nonreligious employers must rely on secular benefits and punishments, together with the strength, quality and benevolence of management to insure productivity and discipline. Section 702, however, permits religiously affiliated employers to invoke spiritual concerns and otherworldly blessings and punishments in controlling their work forces. Where the activities and jobs are secular, this impermissibly gives religiously affiliated employers a secular benefit over nonreligious employers.

the admixture of religious motivations does not alter a business's effect on commerce."); *Forest Hills Early Learning Center, Inc. v. Lukhard, supra; Donovan v. Shenandoah Baptist Church*, 573 F. Supp. 320, 325 (W.D. Va. 1983).[33]

3. Section 702 Impermissibly Delegates Governmental Power to Religious Employers and Conveys a Message of Government Endorsement of Religious Discrimination

By permitting religious employers to require religious obedience and loyalty from all of their employees, section 702 grants religious employers the power to nullify or veto a wide variety of important statutory rights which their employees are supposed to enjoy. One of the most clearly exclusive governmental powers is the enactment of legislation defining rights and affording remedies for those rights. Congress and the states have concluded that the employees of religious employers should have the protection of important labor laws, including Title VII, the Equal Pay Act and other antidiscrimination laws, the Fair Labor Standards Act, the National Labor Relations Act and the Occupational Health & Safety Act. But the section 702 exemption gives religious employers the power to nullify or veto those rights. Religious employers can invoke notions of religious loyalty or obedience to obtain an employee's purported waiver of statutory rights, *Tony & Susan Alamo Foundation*, *supra* (religious employer presented testimony of employees that they did not expect payment of wages), or to punish employees for assertion of those rights, *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986) (religious employer fired employee who consulted lawyer regarding potential sex discrimination claim for violation of "biblical chain of command" which requires internal resolution of all disputes); *see E.E.O.C. v. Pacific Press Pub.*

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33 Appellants have never claimed that their employees at the Gym or Beehive Clothing Mills are exempt from federal minimum wage laws. *See, e.g.*, R. XIV at 24.

Ass'n, *supra* (same). Even religious employers not subscribing to the "biblical chain of command" likely would not appreciate their employees asserting their rights under federal and state labor laws and it does not require an assumption of bad faith on the part of an employer to fear that the employer would invoke notions of religious obedience to deter employees from asserting those rights. *See Tony & Susan Alamo Foundation, supra*, 471 U.S. at 302 (". . . employers might be able to use superior bargaining power to coerce employees . . . to waive their protections under the Act."); *see also N.L.R.B. v. Salvation Army of Mass., supra*, 763 F.2d at 7.

Section 702's effective and standardless delegation of this governmental power to religious employers violates the Establishment Clause, at least with respect to secular employees like Mayson. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). And it gives another impermissible economic advantage to religious employers over nonreligious employers.

Section 702 also impermissibly confers symbolic benefits on religious employers. *See Grand Rapids School District v. Ball, supra*, 105 S.Ct. at 3226. In an area as heavily regulated as the employment relationship in modern American society, the government's sanctioning of religious discrimination by religious employers, where there is no free exercise justification for such discrimination, conveys to an objective observer a message of government endorsement of practices which advance religion, coerce religious loyalty and encourage religious intolerance. *See State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 n.16 (Minn. 1985), *app. dismissed sub nom. Sports & Health Club, Inc. v. Minnesota*, 106 S.Ct. 3315 (1986) (refusing exemption for religious discrimination, despite employers' sincerely held beliefs, because if such an exemption were granted "we might justly be accused of significantly encouraging private discrimination.")[34]

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34 With respect to the "objective observer" familiar with "the Free Exercise Clause and the values it promotes" of whom Justice O'Connor speaks, *see Wallace v. Jaffree, supra*, 472 U.S. at 83, it should be

4. Section 702's Religious Distinctions Violate Equal Protection Principles

Both appellants and the government correctly concede that Equal Protection principles are implicated by section 702. C.P.B. Brief at 38 n.40; U.S. Brief at 39 n.22. That is so because section 702 draws two distinctions solely on religious grounds. It distinguishes between employees of nonreligious employers and employees of religious employers, giving less protection against employment discrimination to the latter than to the former. It also distinguishes between religious employers and nonreligious employers, giving greater leeway to discriminate to the former than to the latter. In drawing these lines, section 702 seriously burdens the religious liberty of employees of religious employers, and it gives religious employers the advantages described above over nonreligious employers.[35]

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noted that all five federal judges to have considered the matter have believed that § 702 is unconstitutional as applied to secular activities. *See King's Garden, Inc. v. F.C.C., supra; Feldstein v. Christian Science Monitor, supra*; *Amos v. Corporation of the Presiding Bishop*, 594 F. Supp. 791 (D. Utah 1984).

35 Contrary to the claims of appellants and the government, there is also a danger of denominational discrimination under § 702. On its face, the § 702 exemption is available only for religious corporations, associations, educational institutions or societies. This definition will likely be applied to favor more traditional, formally organized religious groups while excluding followers of newer, less traditional or formally organized religions. For example, while the "born again Christian" employers in *State by McClure v. Sports & Health Club, Inc., supra*, would not fall within the scope of the § 702 exemption, they presented a stronger case for an exemption from antidiscrimination laws than appellants do here because their discriminatory practices were mandated by a sincerely held religious belief. No such belief required the discrimination against Mayson. A distinction between the Deseret Gym and the Sports & Health Club on the grounds that the latter is a for-profit corporation does not solve the problem. Title VII does not distinguish between for-profit and not-for-profit employers. Moreover, both the Gym and the Sports & Health Club are employers affecting commerce and both sell goods and services to the public.

The risk of denominational discrimination under § 702 would be reduced by limiting the scope of the § 702 exemption to exclude secular activities.

A statute drawing distinctions on religious grounds should be strictly scrutinized. *Larson v. Valente, supra*, 456 U.S. at 246; *King's Garden, Inc., supra*, 498 F.2d at 57; *see* Paulsen, *supra*, at 331, 341. To pass constitutional muster, section 702's religiously-based distinctions must be necessary to serve a compelling interest, and they must trench on First Amendment rights no more than necessary to serve that interest. *Larson v. Valente, supra; see Larkin v. Grendel's Den, Inc., supra*; *Widmar v. Vincent*, 454 U.S. 263 (1981).

As the government correctly concedes, section 702 is a "broad prophylactic exemption," broader than necessary to protect the First Amendment rights of religious employers. *See* U.S. Brief at 17, 27. Since there is no compelling state interest that requires religious employers to be exempt from Title VII's ban against religious discrimination with respect to all of their activities and since there are means available to safeguard the legitimate First Amendment rights of religious employers which are less burdensome on the rights of others,[36] section 702 violates the principles of Equal Protection of the Due Process Clause of the Fifth Amendment. *King's Garden, Inc. v. F.C.C., supra*; *see Welsh v. United States, supra*, 398 U.S. at 357-58 (Harlan, J., concurring).

5. The Religious Institutions Benefitted by Section 702 Are Encouraged to Expand Their Influence in the Secular Economy

An examination of the character and purpose of the religious institutions benefitted and the nature of the aid that the government provides, *see, e.g., Grand Rapids School District v. Ball, supra*, 105 S.Ct. at 3223; *Lemon v. Kurtzman, supra*, 403 U.S. at 615, further underscores the unconstitutionality of section 702. The types of religious sects principally benefitted by the absolute, unbounded section 702 exemption are those

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36 As described above, even without the broad § 702 exemption, Title VII contains ample "breathing space" for the legitimate First Amendment rights of religious employers.

which recognize no distinction between the secular and the divine and those which, seeking to extend their worldly influence, have "the wealth and inclination to buy up pieces of the secular economy." *King's Garden, Inc.*, *supra*, 498 F.2d at 55 (footnote omitted).

The Mormon Church is one such sect:

> . . .[T]here is nothing "otherworldly" about Mormonism in the ordinary sense of the term. As religion and as dynamic organization, it is dedicated to "this-worldly" change aimed at establishing a communally owned and operated business empire and a theocratically ruled, unified world society. For members of the Church of Jesus Christ of Latter-day Saints, the material aspects of human existence are raised to the same status as spiritual concerns, . . . Mormon historian Leonard J. Arrington has written:
>
> "Among the Mormons, things temporal have always been important along with things eternal, for salvation in this world and the next is seen as one and the same continuing process of endless growth. Building Zion, a literal Kingdom of God on earth, has therefore meant an identity of religious and economic values . . . ."
>
> Thus economic growth is an integral part of Mormon theology.

J. HEINERMAN & A. SHUPE, THE MORMON CORPORATE EMPIRE 77 (1985).

This "theology" of economic growth has led the Mormon Church to acquire a "widely diversified and profitable conglomerate" in the communications field, including three television stations and twelve radio stations, extensive agribusiness and commercial real estate holdings, a group of insurance companies, and a large securities portfolio, *see id.*, at 43-124, and to become one of the largest employers in Salt Lake City and the State of Utah. *Id.*, at 92. *See* Farrell, "Utah: Inside the Church State," *Denver Post*, Nov. 21, 1982 (Magazine), 15, at

22; M. LARSON & C. LOWELL, PRAISE THE LORD FOR TAX EXEMPTION 203-09 (1969).[37]

The section 702 exemption gives such expansive, economically oriented sects the power to extract economic contributions and require absolute religious obedience from large numbers of employees, including those engaged in secular activities. The effect is plainly to encourage the further incursion by religious groups such as the Mormon Church into the secular economic realm. The nature of this aid to religious employers—the authority to coerce religious loyalty through economic power—impermissibly aids religion. *Cf. Larkin v. Grendel's Den, Inc.*, *supra* (statute giving churches ability to use political and economic power in religiously nonneutral way).

6. Section 702 Creates Danger of Political Divisiveness Along Religious Lines

This Court has found it useful to consider whether a form of government aid creates a danger of political divisiveness along religious lines. *See, e.g., Larkin v. Grendel's Den, Inc., supra; Larson v. Valente*, *supra*; *Committee for Public Education v. Nyquist*, *supra*. The danger of political divisiveness created by the unbounded section 702 exemption warrants consideration here.

Economics and politics are integrally related. The section 702 exemption gives religious employers a powerful tool to expand their influence in secular economic activity. They can bestow secular employment on the faithful and withhold it from outsiders. If a religious sect controls a significant portion of the available employment opportunities in a community, it controls who may remain in the community and thus who may participate in the community's political and economic life.

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37 Other religious sects similarly have the means and inclination to acquire pieces of the secular economy. *See generally* M. LARSON & C. LOWELL, THE RELIGIOUS EMPIRE (1976); D. ROBERTSON, SHOULD CHURCHES BE TAXED 113-38 (1968).

When a religious sect controls peoples' livelihoods, political division on sectarian lines is likely, if not inevitable.

It is coincidental, but not insignificant, that this case arises from the State of Utah. To a substantially greater extent than in any other State in the Union, the political, social and economic life of Utah is influenced, if not controlled, by one religious sect.[38] The Mormon Church is one of the largest employers in Utah and its extensive economic interests give it substantial control over the economic life of the State. Whether or not the Mormon Church currently exercises all the power that section 702 might give it to control employment opportunities and exclude outsiders, the availability of that power creates a not insubstantial risk of political divisiveness on religious lines.

Similar danger, if on a smaller geographical scale, also exists elsewhere. For example, it is not unfounded speculation to suggest a scenario where affluent followers of a religious sect descend upon a small rural community and buy up large portions of the community's land and businesses.[39] Section 702 could permit the sect to compel residents to convert to its religious beliefs or leave town by its control over the community's employment opportunities. The danger of serious political tension and division along religious lines is obvious.

7. Neither Historical Tradition Nor the Intervention of Private Choice Can Sustain Section 702

The section 702 exemption lacks the historical tradition which supported the property tax exemption in *Walz v. Tax*

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38 *See, e.g.*, J. HEINERMAN & A. SHUPE, *supra*; Farrell, *supra*; *see generally* R. GOTTLIEB & P. WILEY, AMERICA'S SAINTS: THE RISE OF MORMON POWER (1984).

39 *See, e.g.*, "Religious Group's Plan for Valley in Montana Stirs Fears Among Residents," *New York Times*, Nov. 30, 1986, at A30; *State of Oregon v. City of Rajneeshpuram*, 598 F. Supp. 1208 (D. Or. 1984); Note, *Rajneeshpuram: Religion Incorporated*, 36 Hastings L.J. 917 (1985); "Tension Building Over Oregon Sect," *New York Times*, Sept. 16, 1984, at A38, Col. 1; "Political Storm Swirls Around Newcomers to the Guru's Fold," *New York Times*, Nov. 3, 1984, at A8, Col. 1.

Commission, *supra*, the legislature's chaplain in *Marsh v. Chambers*, 463 U.S. 783 (1983), and the Christmas display in *Lynch v. Donnelly*, *supra*. Prior to the enactment of the Civil Rights Act of 1964, all private employers generally were free, as a matter of federal law, to discriminate on all of the bases now prohibited by Title VII. However, since the passage of Title VII and other federal and state laws governing the employment relationship during the twentieth century, this Nation's historical tradition has been to apply labor laws to religious employers,[40] except where the First Amendment clearly requires an exemption.[41] *See* Berman, *Religion and Law: The First Amendment in Historical Perspective*, 1 Juris 1, 3 (1986) (". . . the strength of a historical argument, in the American legal tradition, depends on the concept of history as an ongoing process rather than as something that stopped at some particular date in the past."); *see also Abington School District v. Schempp*, *supra*, 374 U.S. at 236-42 (Brennan, J., concurring).

Similarly, cases like *Walz*, or *Witters v. Washington Dep't of Services for the Blind*, 106 S.Ct. 748 (1986), and *Mueller v. Allen*, *supra*, which upheld educational benefits to religious individuals, do not support section 702. The benefits in those cases were not bestowed exclusively on religious groups. *See Walz*, *supra*, 397 U.S. at 672-73; *Mueller*, *supra*, 463 U.S. at 397; *Witters*, *supra*, 106 S.Ct. at 752; *id.*, at 754 (Powell, J., concurring); *id.*, at 755 (O'Connor, J., concurring). And in

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40 *See, e.g., Tony & Susan Alamo Foundation*, *supra*; *United States v. Lee*, *supra*; *Volunteers or America-Los Angeles v. N.L.R.B.*, *supra*; *N.L.R.B. v. Salvation Army of Mass.*, *supra*; *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985) (state labor relations board has jurisdiction over parochial school's lay teachers); *E.E.O.C. v. Fremont Christian School*, *supra*; *E.E.O.C. v. Pacific Press Pub. Ass'n*, *supra*, *King's Garden, Inc. v. F.C.C.*, *supra* (FCC may proscribe religious discrimination by religious licensees); *cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, *supra*.

41 *See N.L.R.B. v. Catholic Bishop of Chicago*, *supra*; *Rayburn v. General Conf. of Seventh-day Adventists*, *supra*; *McClure v. Salvation Army*, *supra*.

Mueller and Witters state aid went to individuals who could choose between using the aid for religious or secular education. Section 702 stands in stark contrast. The class benefitted is defined solely in religious terms and the statute recognizes and encourages only one choice—the employer's choice to advance religion through imposition of religious requirements on employees.

Freedom of individual religious conscience is the central liberty protected by the Religion Clauses of the First Amendment. *See Wallace v. Jaffree, supra*, 472 U.S. at 50; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The autonomy of religious organizations, to be sure, also deserves some constitutional protection. The problem with section 702 is that its "broad prophylactic exemption" totally subordinates individual religious freedom in favor of protecting the preferences of organizations even though clearly the Religion Clauses do not require such sweeping, absolute deference. As applied to employees like Mayson, "Congress has chosen too blunt an instrument for such a delicate task." *See F.E.C. v. Massachusetts Citizens for Life, Inc.*, 107 S.Ct. 616, 631 (1986).

II.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN CONCLUDING THAT MAYSON IS ENTITLED TO BACK PAY

Appellants claim that the district court abused its discretion in awarding Mayson back pay, despite the strong presumption in favor of back pay awards. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).[42]

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42 Appellants never objected to Mayson's request for reinstatement, App. 120a, underscoring the absence of any sincere religious objection to Mayson's employment at the Gym. Even if this Court concludes that back pay should not have been ordered, the uncontested reinstatement order must stand.

Title VII remedies seek to cure the consequences of employment practices, not to punish motivation. Thus, an employer's good faith is not a defense to the back pay remedy. *Id.*, at 422; *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).[43] The district court correctly concluded that denial of back pay would frustrate Title VII's "make whole" purpose because Mayson's unlawful firing resulted in a substantial pay cut and decrease in his pension benefits. App. 116a-119a.[44] In equitable terms, the consequences to Mayson of denying back pay are severe; the consequences to his employer of awarding back pay are *de minimis*.

The equities here stand in stark contrast to those in *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983). *Manhart* held that requiring larger pension contributions from female employees than from males violated Title VII, but the Court refused to order retroactive relief for two reasons. First, pension administrators may have thought it unfair or even illegal to require male employees to shoulder more than their "actuarial share" of the pension burden, since men, as a group, die at a younger age than women and would therefore be subsidizing women's pensions. 435 U.S. at 720 & n.38. Second, a repayment obligation could have catastrophic effects on pension plans and on their innocent third-party beneficiaries. *Id.*, at 721-23; *see Norris*, *supra*, 463 U.S. at 1105-07. *Compare Spirt v. Teachers Ins. & Annuity Ass'n*, 735 F.2d 23, 26-27 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984).

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43 While the unbounded § 702 exemption was on the books, serious questions regarding its constitutionality had been raised as early as 1974. *King's Garden, Inc.*, *supra*.

44 After the district court's back pay order, the parties stipulated that Mayson was entitled to back pay through December 31, 1985, in the amount of $55,896, plus pension contributions, after considering the wages Mayson earned pursuant to his duty to mitigate. R. VI at 139-42. That sum, substantial to a person of Mayson's means, demonstrates the callousness of the government's suggestion, U.S. Brief at 37, that if Mayson did not like his employer's discriminatory practices he could find a job elsewhere.

The unique factors present in *Manhart* and *Norris* are not present here. Appellants may have thought their discrimination was permissible; clearly they did not think it was required.[45] And no special or catastrophic harm will befall appellants or innocent third parties if Mayson is made whole. The burden of back pay liability will be insignificant given appellants' resources.[46]

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45 The § 702 exemption permitted religious discrimination; it did not require conduct later held to constitute unlawful discrimination. This distinguishes this case from the cases where courts have excused employers from back pay liability where their conduct was based on the requirements of state "female protective" statutes. *See Albemarle, supra*, 422 U.S. at 423 n.18, and cases there cited. *See also Costa v. Markey*, 706 F.2d 1, 6-7 (1st Cir.), *rev'd on other grounds*, 706 F.2d 10, (*en banc*), *cert. denied*, 464 U.S. 1017 (1983) (municipality's reliance on permissive state statute to justify discrimination later held unlawful is not a defense to back pay).

46 Section 713 of Title VII, 42 U.S.C. § 2000e-12, which exempts employers from liability if they prove that a challenged employment practice was in good faith conformity with and reliance on a written opinion of the EEOC, applies only in the narrow situation it explicitly addresses. *Albemarle, supra*, 422 U.S. at 423 n.17.

CONCLUSION

As applied here, section 702's absolute, unbounded accommodation of the employer's inconsistently applied preference to discriminate—causing a direct, severe burden on the religious liberty of the employees—violates the Establishment Clause. The judgment in favor of Mayson should be affirmed. The case then should be remanded to the district court for further proceedings on the claims of the remaining plaintiffs.

Dated: February 23, 1987

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Supreme Court, U.S.
FILED
MAR 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-179, 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellants,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Utah

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REPLY BRIEF IN NO. 86-179

The basic defect in appellees' brief is that it ignores the narrowness of the question presented in this case. This is not a case in which a legislature, starting from ground zero, conferred upon religious entities a benefit that is available to no one else. It is a case in which Congress imposed obligations on all employers, including religious employers, not to discriminate on the basis of race, color, sex or national origin. But, with respect to religious preference hiring, Congress exempted religious employers in order to avoid what it correctly perceived

as serious constitutional questions that the legislation otherwise would raise. Once this valid purpose is recognized, appellees' case is reduced to little more than an assertion that Congress has acted unconstitutionally because its legislation did not go as far as the appellees would have hoped. What if Congress in 1972 had simply repealed Title VII? Obviously, no constitutional guaranty would be violated. When, as here, Congress acts with a valid secular purpose—advancing free exercise values and avoiding Establishment Clause problems—and when its choice entangles government with religion less than the alternatives, it should enjoy broad discretion to decide how much employment discrimination it wants to prohibit.

Appellees have not directly addressed this fundamental legal point. Instead, their attack on the constitutionality of Section 702 proceeds mainly from two erroneous and misleading factual points.

First, contrary to the claims of appellees, this is not a case in which the Mormon Church has attempted to use economic leverage to further its religious beliefs. Instead, the district court found that "there is no evidence in this case that the defendants are using or ever would use Section 702 to further [their] religion." (J.S. App. 73a n.69.) Thus, the district court did not find—and could not have found—that appellee Mayson's free exercise rights were implicated by the Church's activities, much less violated by any *governmental* policy. Second, again contrary to the claims of appellees, this is not a case in which the Church has attempted to gain an unfair competitive advantage over other commercial enterprises by means of reliance on an exemption from federal law. It is undisputed on the record that the activities involved in this case—Deseret Gymnasium, Deseret Industries and Beehive Clothing Mills—are subsidized by the Church. Moreover, it is undisputed that the Church's policy of employing only its members who are eligible for a temple recommend is applied only to its non-profit ac-

tivities and *not* to commercial enterprises which the Church owns. Accordingly, two of appellees' principal arguments are founded on fundamentally false factual premises.

1. In the opening brief, we argued (CPB Br. 17-23) that the district court's invalidation of the amended Section 702 and its application of Title VII to the Mormon Church's employment practices generally, and at Deseret specifically, infringed appellants' free exercise rights in two ways: (1) it overrode the Church's sincere beliefs about how best to further its religious objectives, and (2) it invaded the Church's autonomy. Further, the court advanced no compelling interest found in either the Constitution or any statute to justify this intrusion. Accordingly, in the circumstances of this case, Section 702, by protecting those freedoms, did not establish religion in violation of the First Amendment.

a. Appellees' initial response is that there is no infringement of the free exercise of religion because the Mormon Church has not uniformly applied its policy of hiring only those eligible for a temple recommend in those non-profit activities of the Church which are related to the achievement of religious objectives.[1] But this response, by itself, is irrelevant to the appropriate inquiry under the Free Exercise Clause.

The initial issue in a proper free exercise analysis is whether the action appellees and the district court seek to prohibit constitutes "merely a matter of personal preference." *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972). There is no question that the basic employment policy of the Church in its non-profit activities and the appli-

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[1] Appellees make much of one instance in which this policy was not applied to a squash teacher at Deseret. The record shows that the reason for this exception was Mr. Khan's special qualification for a particular task. (R. XI at Ex. 20.) *See also* affidavit of Borchert (R. XIV at 122.) Certainly, the Constitution does not prevent the Church from making exceptions to its policy.

cation of that policy to Deseret has a religious basis.[2] Appellees have never challenged the sincerity of the Church's beliefs, and their reliance upon exceptions to the Church's policies implementing their beliefs is simply no basis for holding now that the religious hiring preference is not based on genuine religious views. If there is a minimum threshold requirement that churches must satisfy to qualify an activity as sufficiently religious, that requirement is clearly met here. The fact that some employees of the Church's non-profit operations are not eligible for temple recommends no more undermines the sincerity of the Church's preferences based on its religious tenets than the fact that the Amish in *Yoder* were willing to permit their children to be educated in public schools through elementary grades. Notwithstanding this exception to the Amish's preference to remain largely apart from the rest of society, this Court still held that the preference was entitled to protection. 406 U.S. at 224-225.[3]

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[2] The contention by the *amicus curiae* AFL-CIO that this is not a case "in which a religious organization [has] a religious tenet requiring the employment of only its members in secular activities" (AFL-CIO Br. 11) is wide of the mark. First, it is inconsistent with the record (*see* CPB Br. 4 and authorities cited therein, especially affidavit of Wayne Nelson, ¶ 6 (R. XIV at 199.))

Moreover, even if there were no such record in this case, the determination of a church's tenets is not a matter for the AFL-CIO, the appellees or federal courts. Surely the free exercise guarantee affords churches at least as much administrative discretion to carry out broader religious objectives as federal administrators enjoy in implementing governmental policies. *Compare Udall* v. *Tallman*, 380 U.S. 1 (1965). Absent insincerity, the Church here is entitled to conform its activities to its view of religious doctrine without interference from government.

[3] Nor is it relevant to the question of infringement of religious freedoms that the Church began to enforce its employment preference during the 1970s. This Court just recently held that the First Amendment protects free exercise rights regardless of when the beliefs are adopted or exercised. *Hobbie* v. *Unemployment Appeals Comm'n*, No. 85-993, slip op. at 7-8 (Feb. 25, 1987). Appellees

Most importantly, appellees cannot and do not dispute the Church's core contention that the operation of Title VII, as implemented by the district court, infringes appellants' free exercise right to engage in religious preference hiring. The Church's religiously-based preferences have been declared unlawful; the Church is required to employ individuals who do not share the Church's values in activities related to the achievement of religious objectives and to pay them with money obtained from other members of the Church. This is a direct and substantial intrusion into the Church's religious freedom. (See CPB Br. 21-22.)

b. Appellees also argue that the district court's order does not infringe the Church's free exercise right to autonomy. They assert that all religious institutions are subjected to some scrutiny when they step into the secular world, but that such scrutiny does not violate the Constitution. Appellees urge that this Court, in cases like *Tony & Susan Alamo Foundation* v. *Sec'y of Labor*, 471 U.S. 290 (1985), has inquired into whether certain activities of religious organizations are or are not in fact religious. The district court's rule, we are assured, is nothing more than a permissible extension of those practices in another context, which still allows a church to determine such matters as who can be members, what its core beliefs will be and who can serve in minister-like positions. (Appellees Br. 7.)

What appellees ignore is that, in virtually every instance in which the government is required to scrutinize whether activities are "religious" or "secular," the reason for the inquiry does not raise free exercise questions—either the religious entity itself seeks an exemption under the Free Exercise Clause from a statute of general application or a legislature has granted "reli-

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have not and cannot dispute that the actions of the Church derive from sincere religious views and are not based merely on a "personal preference."

gious" institutions some benefit or protection and an entity claims to qualify under the relevant definition of "religious." Thus, the governmental scrutiny is at the behest of the religious organization. It is not imposed but invited. And it can be justified as required by either the Constitution or statute. See p. 10, *infra*. Here, the district court has gratuitously invaded the Church autonomy.

Moreover, in other contexts where Congress chooses to regulate religious entities, the level of scrutiny ordinarily is minimal, as in *Alamo*. The cases discussed at pages 20-21 of our opening brief establish that there is a point beyond which no governmental body may go in scrutinizing the Church and second-guessing its judgment about what is and is not religious. Here, the Mormon Church's operations have been subjected to extraordinary review by the district court. They have also been subjected to exacting review by private litigants through discovery permitted by the court below. (See CPB Br. 10-11.)[4] This Court has held that such governmental scrutiny raises a serious free exercise issue. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

In sum, the district court's treatment of the Mormon Church has struck at the very core of what the Free Exercise Clause reserves exclusively to the churches themselves: determining what are "the religious rituals or tenets of the religious organization," determining how well those tenets are served by particular practices and

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[4] Appellees assert that "*civil authority* must have the power independently to analyze and characterize as religious or secular the activities of religious groups" or else "religious groups would be above the law." (Appellees Br. 21; emphasis added.) But this is patently erroneous. Religious institutions still remain subject to government regulation whenever Congress has identified a sufficiently compelling interest to justify the governmental interference with free exercise rights. When it has, then the Constitution is not violated. Here Congress made the contrary judgment and chose not to regulate religion.

being free from casual interference by civil authorities. The district court's analysis, with its inquiries into whether "substantive" relationships exist between church doctrine and church practices (J.S. App. 10a-11a), clearly infringes the Church's rights sufficiently to acquire a compelling justification.

c. Once it is established that appellants' free exercise rights have been violated, then the only issue that remains is whether there is any compelling governmental justification for the infringement. In its opening brief, the Church explained that there was "no basis in precedent or logic" for the district court to ignore the judgment of Congress and itself create "a compelling interest to eliminate religious discrimination where the Congress itself had found none." (CPB Br. 22.) Appellees have not and cannot remedy this fatal defect in the district court's analysis.

The district court merely noted, in conclusory fashion, the need to eliminate discrimination based upon religion, and appellees have not cited to any constitutional or statutory interest that could justify the infringement in this case. Accordingly, appellees cannot provide any legally relevant justification for the district court's infringement of the Church's free exercise rights, and Section 702, by protecting those rights, *as Congress intended*, cannot constitute an establishment of religion in the circumstances of this case. *Zorach* v. *Clauson*, 343 U.S. 306, 312-314 (1952); *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970).

2. Appellees cannot seriously maintain that Section 702's exemption is unconstitutional under the two-part approach of *Walz* v. *Tax Commission*, *supra*, and *Gillette* v. *United States*, 401 U.S. 437 (1971), which this Court has used to evaluate whether an express governmental exemption violates the Establishment Clause. (CPB Br. 25-38.) In contrast to the holding of the district court (J.S. App. 40a), they briefly, weakly and erroneously

maintain that Section 702 did not have a valid secular purpose.[5] (See Appellees Br. 24-25.) They then fail completely to rebut the Church's submission that Section 702 involves far less governmental entanglement with religion than the complex, three-part test created by the district court. Instead, appellees are forced to argue that the *Walz-Gillette* approach is not applicable to this case for several reasons. None is persuasive.

First, appellees attempt to distinguish *Walz* and *Gillette* (Appellees Br. 23), while completely ignoring *Bob Jones University* v. *United States*, 461 U.S. 574, 604 n.30 (1983), a recent case which followed the *Walz-Gillette* approach. (CPB Br. 32-33.) Appellees cite two "distinguishing" factors in *Walz*: (1) "the exemption was not confined to religious property," and (2) "there has been a long historical tradition of exempting religious, along with charitable and educational property, from property tax." (Appellees Br. 23.) The first attempted distinction of *Walz* is irrelevant. The second is simply not a distinction.

It is true that the exemption in *Walz* was not confined to religious property. But, while the exemption in *Walz* involved both religious and non-religious entities, that distinction does not explain *Gillette*, which involved an exemption based exclusively on religious beliefs. Nor does it explain *Bob Jones University*, 461 U.S. at 604 n.30, which, like *Gillette*, rejected a claim that an exemption for one type of religious activity, but not another, violated the Establishment Clause. The second suggested *Walz* distinction—the significance of the "long historical tradition"—cuts in favor of this statute rather than

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[5] Not only do appellees fail to rebut the Church's analysis of the legislative history (CBP Br. at 26-29), but they fail to cite to *any* statutory language or legislative history indicating a sectarian, as opposed to a secular, purpose. Their discussion of "purpose" is simply their "effects" argument under a different heading, and has no validity.

against it. Section 702 as amended was bottomed on a national tradition which for the better part of two centuries kept the federal government out of religious preference hiring. After trying it the other way for eight years, Congress decided that the traditional way was better.

Appellees also claim that this case, unlike *Walz* and *Gillette*, imposes "direct and obvious burdens on the religious liberty of others." (Appellees Br. 23.) But, as noted above, this argument that the Mormon Church is attempting to use its leverage as an employer to deprive appellees of their religious freedom seriously mischaracterizes the facts of this case as found by the district court. (J.S. App. 73a, n.69.) The argument is also inadequate as a matter of law. The decision whether to pay tithing and otherwise qualify oneself for Church employment is a decision for each individual, and a decision which these appellees have made. In exercising their choices, they have removed themselves from the private employment standards of the Church. Appellees cannot seriously maintain that *the government* is interfering with their religious liberty when it chooses not to regulate a private employment relationship which had been unregulated for 175 years. Indeed, *Gillette* holds that the incidental effect on the range of religious choice is not sufficient to invalidate a congressional exemption statute.[6] Mr. Gillette would not have lost his case—he would not have been drafted—if his religious beliefs had been different. But the incidental effect on those beliefs did not make the congressional statute coercive—or unconstitutional.[7] See also *Bob Jones University*, 461 U.S.

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[6] The effect in this case is incidental, as shown by the district court's finding that there was no evidence that appellants have used or would use their employment criteria to further adherence to religious beliefs.

[7] The Court in *Gillette* pointed out that the conscientious objector exemption (like the exemption here) "does not single out any reli-

at 603-604 (fact that denial of tax exemption would have "substantial impact" on schools segregating due to religious beliefs not relevant to Establishment Clause analysis).

Second, appellees cite a number of inapposite cases where the courts have had to draw lines between religious and secular activities. (Appellees Br. 16-21.) But such line-drawing was necessary either (a) to protect free exercise rights from a statute of general application, as when the courts have held Title VII's general ban on sex discrimination does not apply to a Church's "minister-like" functions,[8] or (b) to carry out a congressional mandate that benefits religious organizations, as when courts interpret certain definitional tax code provisions, which exempt "religious" institutions from certain requirements.[9] Such constitutionally or statutorily compelled line-drawing by courts is irrelevant to the question here of whether Congress' express determination to avoid such judicial line-drawing to advance free exercise values and avoid Establishment Clause problems violates the Establishment Clause. As we have em-

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gious organization or religious creed for special treatment." 401 U.S. at 451. The court further explained:

> "[The laws] are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial government interests that relate directly to the very impacts questioned." *Id.* at 462.

[8] *See, e.g., McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). *Cf. Tony & Susan Alamo Foundation* v. *Sec'y of Labor*, 471 U.S. 290 (1985) (applying Fair Labor Standards Act to secular activities of a religious organization).

[9] *See, e.g., Tennessee Baptist Children's Home, Inc.* v. *United States*, 605 F. Supp. 210 (M.D. Tenn. 1984), *aff'd*, 790 F.2d 534 (6th Cir. 1986).

phasized, the second part of the *Walz-Gillette* approach is satisfied because Congress' choice involves demonstrably less government entanglement with religion than the district court's test. (CPB Br. 34-38.) None of the cases cited by appellees rebuts the fundamental proposition that Congress' choice here involves less entanglement than the district court's test.

Appellees' argument thus ignores the fact that in this case—unlike any case on which they rely—Congress itself identified free exercise and Establishment Clause problems, and attempted to avoid them by an exemption. Appellees do not dispute that, under this Court's cases, Congress' judgment counts for something. Yet, under appellees' argument, it counts for nothing. Appellees fail to recognize that Congress was faced with a serious problem of constitutional dimension, and that, of the three available options (assuming Title VII's applicability to religious employers), it chose the one which least intruded into First Amendment values. (CPB Br. 15-16.) Apparently, their position is that the 1964 version of Section 702 was the only one that was constitutionally acceptable.

We submit, for reasons explained in our opening brief, that Congress made the *correct* choice when in 1972 it concluded that the amended version of Section 702 was substantively preferable to the 1964 version of Section 702, a version which required the courts to draw a line between "religious" and "secular" in the "sensitive" area of religious preference hiring. (J.S. App. 51a.) More importantly, under the approach of *Walz-Gillette*, Congress clearly made a *permissible* choice that does not violate the Establishment Clause because "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Commission*, 397 U.S. at 673.

Finally, after mischaracterizing the *Walz-Gillette* approach,[10] appellees maintain that that approach is "limitless" and would "eviscerate" the Religion Clauses. (Appellees Br. 22.) The short answer to this contention is that the Church's so-called "formula" is not its own idiosyncratic view but is instead directly derived from this Court's express exemption cases—*Walz*, *Gillette* and *Bob Jones University*. Further, the parade of purported horribles which appellees claim would result from the approach (Appellees Br. 22) have simply not occurred in the nearly two decades since *Walz* and *Gillette* were decided. As Congress' action in rejecting the broader amendment in 1972 reveals, legislatures are not prone to elevate religious values over other social concerns and thus do not lightly grant exemptions unless serious free exercise concerns are implicated, such as in the case of religious preference hiring. Moreover, rather than being "limitless," the *Walz-Gillette* approach imposes significant restrictions on legislative action. Under the approach, it is appropriate to look carefully at the purpose of a legislative act to ensure that any express exemption was enacted for a valid, secular reason. Moreover, not all exemptions would necessarily be less "entangling" than the alternatives. For example, an exemption might create a danger of political divisiveness along religious lines. *Cf. Larson* v. *Valente*, 456 U.S. 228 (1982).

In the end, there are good reasons why exemption cases should be judged by standards different from those which determine the constitutionality of governmental benefits. Importantly, as this Court has noted, the presence or

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[10] Appellees maintain that the first element of the *Walz-Gillette* approach is that "all accommodation of religion by exemption would be deemed to have a proper purpose." (Appellees Br. 22.) Of course, that is not the formulation of this Court's cases—nor of the Church's opening brief. Instead, the legislature must have acted with a valid, secular purpose, as it has in this case in seeking *both* to advance free exercise values and to avoid Establishment Clause problems.

absence of an exemption will inevitably have an "advancing or inhibiting" effect on religion, and thus a consideration of effects is not a useful inquiry in this context. (CPB Br. 23-25; 29-30.) To be sure, the feature that exemptions and benefits share in common is that, in both, government treats religious groups differently than it treats non-religious groups. The critical distinction between the two is that, at least in exemption cases such as this one, and *Walz* and *Gillette*, the difference in treatment comes about because of an attempt by the legislature to avoid a circumstance which it correctly recognized would have raised serious constitutional questions absent the exemption. And the constitutional problems sought to be avoided would result exclusively from Congress' own enactment of an alternative to the statute it finally passed. Thus, the rule that governs this case is a narrow one, tailored to its particular circumstances, and solidly supported by this Court's precedents which fit the same relevant factual pattern as this case. Appellees offer no express exemption case which applied a standard different from the *Walz-Gillette* approach, and we are aware of none.[11] Under that standard, Section 702 is constitutional.

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[11] *Larson* v. *Valente*, 456 U.S. 228 (1982), on which appellees rely, is actually authority against them. Appellees ignore the fact that the defect in the Minnesota statute in *Larson* was that "the provision was drafted with the explicit intention of including particular religious denominations and excluding others." 456 U.S. at 254. It thereby violated the "clearest command of the Establishment Clause": "one religious denomination cannot be officially preferred over another," *id.* at 244, a rule which does not apply to this case. The statute imposed registration and reporting requirements on groups engaged in charitable solicitation. It was designed to prevent fraud, and had originally exempted all religious organizations. In 1978, however, the exemption was narrowed to include only those that received more than half of their total contributions from their members. As amended, the provision was unconstitutional because it preferred some religious organizations over others. The Court's opinion makes quite clear, however, that an exemption which includes *all* religious organizations, without discrimination among

3. Moreover, even if the amended Section 702 is evaluated under the three-prong standard of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), it is clear that the provision is valid under the Establishment Clause. The principal argument appellees advance under the *Lemon* standard is that Section 702 fails to pass the second test —*i.e.*, that the effect of Section 702 is to advance religion.[12]

As demonstrated in appellants' opening brief, the "principal or primary effect" of the statute is to eliminate government interference with religious institutions. (CPB Br. 39-41.) This statute avoids the evils which the Establishment Clause was adopted to prevent; the statute involves *no* active cooperation between government and religion, *no* government subsidy to church activities, *no* attempt by government to coerce religious beliefs and *no* preference for one sect over another. *Lemon*, *supra*, 403 U.S. at 612. Appellees have made no attempt to show that Section 702 creates any of these traditional Establishment Clause problems.

With respect to the "effects" issue, appellees' principal contention is that Congress has given religious employers

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them, would be constitutional. The opinion notes, for example, that Minnesota could deny the benefits of the exemption to the Unification Church if it could prove that the Unification Church, is not a "religious organization." 456 U.S. at 255 n.30. *Larson* is further helpful because the purpose of the exemption in that case was to eliminate potential entanglement. *Cf.* 456 U.S. at 251-55 (entanglement problems of statute).

[12] With respect to the first prong, for reasons discussed above and in our opening brief, the district court correctly found that Congress acted with a valid, secular purpose when it enacted Section 702. Appellees do not even discuss the third prong—the entanglement issue. Yet, entanglement is the most serious freedom of religion issue in this case. The entanglement at issue here is that caused by an invasion of church beliefs and autonomy by the judiciary and EEOC. That unconstitutional entanglement is not something that Congress created—it is precisely what Congress attempted to avoid in amending Section 702.

an economic lever with which they can, through their employment policies, allegedly coerce conformity to religious objectives. As discussed above, this argument has no basis in the record of this case—the district court rejected the contention that the Mormon Church is using Section 702 as a lever to advance its beliefs. Nor did the district court find that Frank Mayson's free exercise rights were infringed by any governmental action. The absence of such a finding ends appellees' loosely stated "coercion" argument.

In any event, Section 702, as amended, is not coercive. All that Congress has done is to allow religious institutions to choose for themselves whether or not they prefer church members to receive the employment benefits the church itself creates. Frank Mayson remains free to believe what he wishes; he simply cannot force the Church to ignore his beliefs. The effect of Congress' decision on religious beliefs and practices is therefore remote and incidental. Certainly the effect of this exemption on religious beliefs is no greater than the effect of the exemption in *Gillette* on the views of those who only opposed certain wars on religious grounds and could therefore be drafted.

There is therefore no comparison between Section 702 and the Connecticut statute declared unconstitutional in *Estate of Thornton* v. *Caldor, Inc.*, 105 S. Ct. 2914 (1985), upon which appellees rely. (Appellees Br. 27-29.) *Thornton* involved a direct effort by the State to coerce action for strictly religious reasons. As this Court expressly held, Connecticut required "[t]he employer and others [to] adjust their affairs to the command of the State." *Id.* at 2918.[13] By contrast, Section 702 does not "command" any private individual—employer or employee —to conform his conduct to religious requirements.

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[13] Appellees' assertion that Section 702, like the law condemned in *Thornton* "is not required to protect the free exercise rights of religious employers" (Appellees Br. 28) is simply wrong. As previ-

Appellees' other assertions concerning how Section 702 "advances" religion are equally unavailing. There is simply no merit to appellees' factual contention that Section 702, as amended, gives religious employers a competitive advantage over other commercial entities.[14] The district court made no finding of fact to support appellees' claim. While appellees correctly point out that the Mormon Church owns several non-subsidized commercial enterprises, "including three television stations and twelve radio stations, extensive agri-business and commercial real estate holdings, a group of insurance companies, and a large securities portfolio . . ." (Appellees Br. 35), appellees disregard the fact that every one of those commercial activities is subject to governmental regulation, including all the prohibitions of Title VII. See CPB Br. 4, and affidavit of Wayne Nelson, ¶ 6 (R. XIV at 199.)[15]

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ously discussed in connection with the free exercise argument, appellants, who are the employers in this case, performs important ecclesiastical functions of the Mormon Church. Under the district court's holding, the identification of "the religious rituals or tenets of [their] religious organization, or matters of Church administration" as well as "the relationship between the nature of the job the employee is performing and the religious rituals or tenets of [their] religious organization" are matters to be determined by federal courts. (J.S. App. 10a, 11a.) Pronouncements concerning Church tenets and the relationships between those tenets and programs designed to effectuate them lie at the very core of these appellants' religious liberty. Yet, under the district court's test, Congress' effort to prevent federal courts from usurping that function is unconstitutional. This conclusion is manifestly wrong because Section 702's primary effect is to protect religious freedoms, while avoiding Establishment Clause problems.

[14] The argument that freeing churches, in part, from Title VII will give them an unfair competitive advantage is at odds with one of Title VII's fundamental premises—that employment discrimination is *un*economic because it prevents employers from hiring the best available employees.

[15] This case clearly does *not* require the Court to resolve the question of whether Section 702 would be constitutional as applied to

Appellees' contentions (Appellees Br. 31-32) that Section 702 delegates a governmental power to religious employers and gives their employment discrimination an official governmental endorsement are also unsupported by any district court findings and are simply wrong. For 175 years, Congress chose not to regulate religious preference hiring. In amending Section 702, *Congress*—not appellants or any other religious institutions—returned this aspect of federal law to its prior historical status. In so doing, however, Congress neither required nor endorsed religious preference hiring. Congress merely acted to prevent the interference with free exercise rights of religious institutions and avoid Establishment Clause problems which arose from the prohibitions on such a practice contained in the 1964 version of Section 702.

The point which appellees have wholly failed to address, or even to acknowledge, is that in this case, there will be effects on religion regardless of which choice Congress makes. (CPB Br. 41-43.) Given Congress' decision to enact an employment discrimination law, and to include religious employers and religious discrimination within its coverage, Congress did not have a choice between a statute that would have religious effects and a statute that would have no religious effects. Indeed, Congress' principal concern when it amended Section 702 was to eliminate an effect—judicial entanglement in church affairs—that its legislation would have on religion if there were no exemption.[16]

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commercial for-profit activities operated by a religious institution. It should be pointed out that neither appellees, nor the *amicus curiae* AFL-CIO, have been able to point to even a single instance in which the Mormon Church, or any other religious institution, has used religious preference hiring in for-profit activities or used it in such a way as to give an unfair economic advantage.

[16] Appellees do not directly address our contention (CPB Br. 41-43) that one way to analyze Section 702 under *Lemon*'s "effects" test is to compare the extent to which the "effect" of the legislation "advances" religion with the extent to which the district court's alternative "hinders" religion. 403 U.S. at 612. Under that approach,

Finally, there is no merit to appellees' argument (Appellees Br. 33-34) that Section 702 violates equal protection principles. Appellees argue that to pass constitutional muster, Section 702's religiously-based distinction must serve a compelling interest and must be the least restrictive alternative for achieving that goal. Appellees do not even address, however, appellants' argument (CPB Br. 38 n.40) that Congress had a compelling purpose in enacting Section 702 to promote free exercise values while avoiding Establishment Clause problems. Moreover, they ignore the fact that, in enacting the amendment, Congress tailored Section 702 to the problem of religious preference hiring by rejecting Senator Ervin's broader amendment that would have exempted religious institutions from *all* of Title VII's prohibitions.

4. In our opening brief we demonstrated that appellants' good faith reliance on the clear language of the Section 702 exemption should preclude an award against them. (CPB Br. 43-46.) This conclusion is strongly supported by Congress' express determination that "no person shall be subject to any liability or punishment for or on account of . . . an unlawful employment practice . . . [undertaken], in conformity with, and in reliance on any written interpretation or opinion of the [EEOC] . . . notwithstanding that . . . such interpretation or opinion is . . . determined by judicial authority to be invalid or

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appellees' claim would clearly be lacking. Appellees cannot deny that the intrusion of the district court into the Church's autonomy and religious practices is substantial. Thus, Title VII, as applied by the court, significantly hinders religious freedom. Appellees' assertions as to how Section 702 "advances" religion—granting religion a competitive advantage, encouraging religion to expand into the secular economy and permitting religion to "coerce" loyalty—are completely speculative and, as such, cannot support overturning legislation. *Larson* v. *Valente*, 456 U.S. at 249. But even if these claims were substantial, the most they do is make the balance between hindering and advancing religion close and in that situation, the Court should defer to the legislative judgment as to how best to advance constitutional values. *Gillette* v. *United States*, 401 U.S. at 460.

of no legal effect . . . ." Section 713, 42 U.S.C. § 2000e-12(b). Appellees contend that because the Church did not rely upon an EEOC opinion, but instead relied upon an Act of Congress, Section 713 is of no relevance here. (Appellees Br. 41 n.46.) This argument is based on an absurd premise. It assumes that Congress intended to give more weight to the EEOC's interpretation of Title VII than to the unambiguous language Congress itself used in enacting that Act. Had any of the appellees ever challenged the Church's employment practices before the EEOC, the Commission would have been bound by Section 702 to issue an interpretation or order denying all relief, and the Church would—without question—now be free of any liability for its religious preference hiring. Under these circumstances, Section 713 is plainly relevant to, if not dispositive of, the question of back pay here, and the district court's award of back pay must be reversed in light of that provision.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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March 17, 1987

FOR ARGUMENT

Nos. 86-179 and 86-401

Supreme Court, U.S.
FILED
MAR 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, ET AL., APPELLANTS

v.

CHRISTINE J. AMOS, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE J. AMOS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

REPLY BRIEF FOR THE UNITED STATES

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No. 86-179

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, ET AL., APPELLANTS

v.

CHRISTINE J. AMOS, ET AL.

No. 86-401

UNITED STATES OF AMERICA, APPELLANT

v.

CHRISTINE J. AMOS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

REPLY BRIEF FOR THE UNITED STATES

In 1972, Congress enacted Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-1, exempting religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. It thus determined that government regulation of the religion-based employment decisions of religious organizations was not a necessary element of its program for combatting religious discrimination in employment. Nothing in the Religion Clauses of the First Amendment, which have as their essential purpose the disassociation of government from religion, supports the startling proposition advanced by appellees in their answering brief—that the exemption contained in Section 702 is invalid because

the Constitution requires Congress to subject the employment practices of religious organizations to government regulation. Instead, as we demonstrated in our opening brief, the Constitution grants Congress the authority to avoid potential entanglement between government and religion by exempting religious organizations from government regulation. Section 702 constitutes such a permissible accommodation to religion and therefore does not violate the Establishment Clause.[1]

1. Appellees first contend that Section 702 cannot be justified as an accommodation of religion. Their principal argument in support of that contention (Br. 14-21) is that the Free Exercise Clause did not compel the adoption of Section 702. This Court has made clear, however, that "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970); see also *Hobbie* v. *Unemployment Appeals Comm'n*, No. 85-993 (Feb. 25, 1987), slip op. 8; U.S. Br. 22. Even if the exemption contained in Section 702 is not mandated by the Free Exercise Clause, therefore, Congress still has authority to adopt the exemption as a permissive accommodation of religion.

Appellees next argue (Br. 22-25) that Congress's authority to enact permissive accommodations of religion by exempting religious organizations from generally applicable government regulations is very narrow, and assert that Section 702 exceeds the limits of that authority. As we explained in our opening brief (at 18-31), government acts to accommodate religion when it exempts religious orga-

[1] Amici AFL-CIO et al. assert (Br. 2-5) that Section 702 is most clearly invalid in exempting the profit-making activities of religious organizations. That question regarding the scope of Section 702 is not presented in this case, however, because the Deseret Gymnasium – the activity in which appellee Mayson was employed – is not a profit-making activity; it is subsidized by the Mormon Church (see U.S. Br. 3-4).

nizations from regulations that may hinder those organizations in the performance of their religious missions. Religious institutions have an interest in defining the limits of religious life and community, and government has a corresponding interest in not entangling itself unnecessarily in the internal affairs of such institutions. Indeed, the nonintervention of government in religion fosters religious diversity and pluralism, facilitating "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952); see also *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976).

Government interference with religious autonomy may involve outright coercion, forcing a religious organization to act in a manner that the organization believes to be inconsistent with religious teachings, or may take the more subtle form of inquiry into—and oversight of—religious activities, implicating the concerns about entanglement of government and religion that underlie the Establishment Clause.[2] This Court has recognized both of these effects

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[2] Appellees' claim (Br. 22) that such a regulatory burden can never implicate the Establishment Clause is simply wrong. This Court has recognized that government investigation into religious organizations may lead to undesirable entanglement between government and religion. For example, in *Larson* v. *Valente*, 456 U.S. 228 (1982), the Court invalidated a state statute requiring religious organizations that received more than fifty percent of their contributions from nonmembers to register under state laws regulating charitable solicitations. In discussing the entangling aspects of the statutory scheme, the Court observed that "[t]he registration statement * * * calls for the provision of a substantial amount of information, much of which penetrates deeply into the internal affairs of the registering organization." 456 U.S. at 253 n.29; accord, *Walz* v. *Tax Comm'n*, 397 U.S. at

in approving exemptions for religious organizations from generally applicable regulatory programs. See, *e.g.*, *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501-504 (1979); cf. *Larson* v. *Valente*, 456 U.S. 228, 252-255 (1982).

The exemption contained in Section 702 plainly protects against government intrusion into decisions related, in the minds of believers, to questions of faith. The amicus briefs filed in this Court by a broad spectrum of religious groups discuss the reasons—rooted in religious belief and practice—that religious organizations must in some circumstances take religion into account in employment decisions. See *e.g.*, Christian Legal Society Br. 5-18; Baptist Joint Comm. on Public Affairs Br. 28-32; American Jewish Congress Br. 25-32; United States Catholic Conference Br. 1-3; General Conference of Seventh Day Adventists Br. 6-8; American Ass'n of Presidents of Independent Colleges and Universities et al. Br. 11-13; National Jewish Comm'n on Law and Public Affairs Br. 7-8. Indeed, the private appellants argue (Br. 17-23) that the Free Exercise Clause insulates the employment decision challenged in this case from government regulation.

Whether or not the arguments advanced by appellants and amici are sufficient to mandate an exemption under the Free Exercise Clause is beside the point. What these arguments demonstrate is that free exercise values are implicated by government regulation of employment decisions based upon religion and that Congress acted reasonably in enacting Section 702 to eliminate potential government infringement of religious autonomy. In addition, Section 702 serves the values embodied in both the Free Exercise and Establishment Clauses by eliminating

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674-676 (in approving a tax exemption for religious property, the Court noted that the exemption would lessen entanglement because it would reduce the occasions for government review of church financial and administrative practices); see also *Gillette* v. *United States*, 401 U.S. 437, 457-458 (1971).

any need for the government investigation of religious activities that would otherwise be necessary to resolve claims that government regulation violated the Free Exercise Clause.[3]

Appellees assert that the prior version of Section 702, which exempted only the "religious" activities of religious institutions from the prohibition against religious discrimination, "provided more than sufficient accommo-

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[3] The Court need not address the merits of the private appellants' free exercise claim because Section 702 renders that inquiry unnecessary. Indeed, as we have discussed, Section 702 was adopted in order to eliminate the need for courts to undertake such inquiries.

Some of the amici supporting appellees argue that Section 702 does not promote free exercise values because religious beliefs or practices do not necessarily require religious organizations to take religion into account in their employment decisions. See AFL-CIO Br. 13-15; Employment Law Center Br. 23-27. That argument suffers from two basic flaws. First, this Court never has indicated that Congress's authority to accommodate religion is restricted to circumstances in which government regulation directly affects religious beliefs and practices. Indeed, in *Walz* v. *Tax Comm'n, supra,* the Court upheld a property tax exemption for religious organizations without first making the (quite unlikely) finding that the tax directly burdened religious beliefs or practices.

Second, as the private appellants and other religious organizations have discussed, religious beliefs may require that hiring be conducted on religious grounds. (Even the AFL-CIO acknowledges this fact (see Br. 15-16).) Congress could reasonably conclude that a general exemption was justified in order to avoid imposing a burden in those circumstances in which religious beliefs require religion-based hiring. As this Court has noted, such 'uniform application of [government regulation] to all religiously operated [activities] *avoids* the necessity for potentially entangling inquiry" (*Bob Jones University* v. *United States,* 461 U.S. 574, 604-605 n.30 (1983), (citation omitted; emphasis in original)). Specifically, such a general rule of exemption both avoids the awkward result of treating some religious organizations differently than others because of a difference in religious beliefs with respect to the employment of non-members, and the necessity of an offensive case-by-case investigation into the nature and sincerity of particular religious beliefs and practices.

dation of the legitimate interests of religious organizations" (Br. 24). But appellees do not explain why their bare assertion that this is so should displace Congress's considered judgment that a broader exemption is appropriate. Indeed, it seems clear that some government interference with religion would persist under the standard suggested by appellees. First, a constricted exemption might force religious organizations, such as the Mormon Church in this case, to alter their employment practices in a manner inconsistent with their beliefs. Second, the limited exemption would mandate—in every case—an inquiry into the beliefs, finances, and administration of the religious organization in order to determine whether a particular activity is "religious." The three-part inquiry devised by the district court (see J.S. App. 10a-17a) graphically demonstrates the entangling nature of the determination that would be committed to the courts and the Equal Employment Opportunity Commission by such a standard.[4]

In sum, by exempting religious organizations from the prohibition against religious discrimination in employment, Section 702 plainly "lifts a government-imposed burden on the free exercise of religion" (*Wallace* v. *Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in

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[4] Appellees discuss in great detail (Br. 16-21) a variety of situations in which exemptions from government regulation are limited to a religious organization's religious activities. But the fact that Congress has created a narrower exemption, or no exemption at all, in some circumstances does not disable it from creating a broader exemption here. And the fact that in some circumstances the courts are required to distinguish between the religious and secular activities of a religious organization does not mean that such inquiries do not implicate the values underlying the Religion Clauses. After weighing the government interests underlying the prohibition against religious discrimination, Congress reasonably determined that potential collisions between government and religion could be avoided by adopting a broad exemption here. That determination sharply distinguishes the present case from the other situations cited by appellees.

the judgment)). It indisputably qualifies as a measure designed to accommodate religion.[5]

2. Appellees take issue with our showing (U.S. Br. 31-39) that Section 702 does not have any effect that the Court has identified as impermissible under the Establishment Clause. We discuss each of their contentions in turn.

a. Appellees' principal claim is that Section 702 has the effect of advancing religion in violation of the First Amendment because it "permits religious employers to advance religion by coercing religious loyalty from secular employees through economic power" (Br. 25). Appellees err fundamentally in attributing to the government the consequences of the voluntary choices of private religious organizations to take religion into account in their hiring decisions.

The First Amendment bars government from influencing an individual's personal religious choice. Section 702 plainly does not constitute such impermissible government influence. It does not say anything about what an individual should or should not believe, and it does not put the force of government authority behind religion in general or any religious belief in particular. The government simply has left religious organizations free to act as they desire. Effects caused by the actions of religious organizations in exercising that free choice are not relevant

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[5] Appellees argue (Br. 22) that if Section 702 constitutes an accommodation of religion, any exemption whatever for religious organizations will fall into that category. What appellees ignore is that such exemptions are not automatic; they must be adopted by the political Branches, which are not likely to act in a manner that could lead to injury to the public at large. (The absence of the broad range of exemptions hypothesized by appellees indicates that appellees' fears are quite unfounded.) In addition, an exemption would not automatically be upheld as an accommodation of religion by the courts; the inquiry would be whether the political Branches could reasonably determine that the exemption promotes the values embodied in the Religion Clauses.

in assessing the validity of government action under the Establishment Clause. Cf. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).[6]

The gist of appellees' argument, therefore, is that government impermissibly affects an individual's religious choice when it fails to eliminate private influences upon that choice. In appellees' view, government has an absolute, affirmative obligation to prohibit religious discrimination by religious organizations. But the First Amendment hardly imposes such a nondiscrimination

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[6] Appellees argue that the absence of government action is irrelevant, relying (Br. 26 n.26) upon this Court's observation that "[t]he Establishment Clause * * * does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not" (*Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)). But the Court made that statement in the course of evaluating *government* action directed against individuals. The statement reflects the conclusion that government action short of direct coercion—such as endorsement by government of a particular religious message—may amount to an exercise of government authority that violates the Establishment Clause. The Court did not endorse the sweeping proposition advanced by appellees—that entirely private conduct that impacts upon an individual's religious choice must be treated as the equivalent of government action. Unlike the statute in *Engel*, which prescribed the text of a prayer to be recited each day in public schools, Section 702 cannot be viewed as establishing a religion, but instead represents government's decision to separate itself from religion.

This analysis is not altered by the Court's rejection of the free exercise claim in *United States* v. *Lee*, 455 U.S. 252 (1982). The Court observed in that case that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees" (455 U.S. at 261). But the Court simply found that the Constitution did not compel an exemption from the statutory scheme; it did not indicate in any way that such an exemption would have been barred by the Establishment Clause or that its observation even would be relevant to the analysis under the Establishment Clause.

mandate on private religious organizations. To do so, of course, would turn the meaning of the First Amendment on its head by depriving such organizations of their liberty to define their own religious missions. The flaw in appellees' reasoning is demonstrated by the implicit suggestion that Congress would be constitutionally obliged to prohibit religious discrimination by religious organizations, even if it did not extend a similar prohibition to secular employees.[7] Of course, prior to 1964 all private employers, including religious employers, were free to consider religion in connection with their employment decisions, and, quite reasonably, no one thought to suggest that such inaction constituted an establishment of religion.[8]

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[7] This conclusion follows unless the asserted impermissibility of Section 702 flows from the distinction in treatment of religious and non-religious employers, thus giving a special significance to the government's inaction vis-a-vis religious employers. As a matter of symbolism, we showed in our opening brief (at 33-34) that Section 702, like the exemptions required by the Free Exercise Clause, conveys the message of noninterference of government in religion that is at the heart of the Religion Clauses. Likewise, as a matter of equal protection analysis, no serious issue is presented. See pages 12-13, *infra*.

[8] Appellees' reliance (Br. 27-29) on *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), is entirely misplaced. The statute at issue in *Thornton* provided employees with an absolute right not to work on their Sabbath. This Court found that the statute violated the Establishment Clause because it endorsed a particular religious belief—Sabbath observance—at the expense of all other interests and because the state coerced private employers to accommodate the religious beliefs of their employees. See *Hobbie* v. *Unemployment Appeals Comm'n*, slip op. 9 n.11 (characterizing *Thornton* as resting on the determination that the state statute "placed an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation"). The impermissible effect of the statute in *Thornton* thus was the *government* coercion directed against employers and employees. Here, by contrast, the government

b. Appellees argue (Br. 37-38) that the exemption contained in Section 702 is not supported by historical tradition and therefore is not permissible under the Establishment Clause. Of course, prior to 1964 there was *no* government regulation of private employment decisions and religious organizations were free, as now, to take religion into account in their employment decisions. Since 1964, for all but the eight years between 1964 and 1972, federal law has recognized such an exemption, and approximately half of the states have adopted statutory exemptions providing religious organizations with protection similar to or greater than Section 702.[9] These state statutes, all of which would be invalid under appellees' theory of the First Amendment, confirm the strong tradition supporting the broad exemption contained in Section 702.

c. Appellees argue (Br. 29-31, 34-37) that Section 702 violates the Establishment Clause because it gives

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has chosen *not* to engage in coercion, remaining neutral in matters of religion and employment. The Establishment Clause therefore is not implicated. See U.S. Br. 37 n.20.

[9] See Alaska Stat. § 18.80.300(4) (1986); Ariz. Rev. Stat. Ann. § 41-1462 (1985); Cal. Gov't Code § 12926(c) (West 1980 & Supp. 1987); Colo. Rev. Stat. § 24-34-401(3) (1982); Del. Code Ann. tit. 19, § 710(2) (1985); D.C. Code Ann. § 1-2503(b) (1981); Haw. Rev. Stat. § 378-3(5) (1985); Ill. Rev. Stat. ch. 68, para. 2-101(B)(2) (Supp. 1986); Ind. Code Ann. § 22-9-1-3(h) (Burns 1986); Kan. Stat. Ann. § 44-1002(b) (1981); La. Rev. Stat. Ann. § 23:1006(A)(2) (West 1985); Me. Rev. Stat. Ann. tit. 5, § 4553(4) (1979); Mass. Ann. Laws ch. 151B, § 4(15) (Law. Co-op. 1976); Mo. Ann. Stat. § 213.010(5) (Vernon Supp. 1987); Mont. Code Ann. § 49-2-101(8) (1985); N.H. Rev. Stat. Ann. § 354-A:8(IV) (1984); N.J. Rev. Stat. § 10:5-12(a) (Supp. 1986); N.M. Stat. Ann. § 28-1-9(B) (1983); N.Y. Exec. Law § 296(11) (McKinney 1982 & Supp. 1986); Pa. Stat. Ann. tit. 43, § 954(b) (Purdon Supp. 1986); R.I. Gen. Laws § 28-5-6 (1986); S.C. Code Ann. § 1-13-80(h)(5) (Law. Co-op. 1986); Utah Code Ann. § 34-35-2(5) (1974 & Supp. 1986); Wash. Rev. Code Ann. § 49.60.040 (1962 & Supp. 1986); Wyo. Stat. § 27-9-102(b) (1977). Several states have not enacted prohibitions against religious discrimination by private employers.

businesses owned by religious organizations a competitive advantage over other businesses. As a threshold matter, it is not clear that the existence of such an incidental benefit would be relevant under the Establishment Clause. See U.S. Br. 35-36. In any event, there is no support for appellees' claim here.

Appellees base their argument entirely on the tithing requirement that is an element of the Mormon Church's religious tenets (see U.S. Br. 5). But, as we noted in our opening brief (at 34-35 n.18), the district court did not rely on the tithing requirement in holding that Section 702 impermissibly advanced religion. The district court did not make any findings regarding tithing and its effect on the competitive position of businesses owned by the Church, and there is no evidence in the record from which the district court could have made such findings. Indeed, there is nothing to support this argument aside from appellees' rhetoric.[10] Moreover, nothing in the record supports appellees' somewhat extravagant claims (Br. 36) regarding the effect of Section 702 upon the Church's overall financial structure. It is difficult to believe that Section 702 is the key to the Church's ability to establish a global financial empire; in the absence of any evidentiary support that contention must be rejected.

More importantly, however, the constitutionality of Section 702 cannot depend on the practices of a particular religious group. The district court did not restrict its holding of unconstitutionality to businesses owned by the Mormon Church, but held Section 702 unconstitutional insofar as it exempted the secular activities of *any* religious organization, regardless of its beliefs or practices. The correctness of that ruling cannot turn upon an intrusive

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[10] It therefore is not clear whether any such competitive advantage actually exists or whether, for example, the narrowing of the Church's labor pool that results from the Church's employment policy actually increases its labor costs.

analysis of the myriad beliefs and practices of religious employers throughout the nation. Such inquiry, offensive in itself, would result in uneven application of constitutional requirements and lead to differing legal obligations among religions, thus implicating the Establishment Clause's requirement of government neutrality among religions.

3. Appellees invoke equal protection principles in support of their challenge to Section 702 (Br. 33-34), contending that the provision is unconstitutional because it distinguishes between employees of religious and secular employers, as well as between religious and secular employers themselves. Section 702 certainly does contain these distinctions, but it just as clearly is not invalid under equal protection principles.[11]

Appellees' basic error is their assumption that the distinctions drawn by Section 702 must be evaluated under the "strict scrutiny" standard. This Court has only subjected government action that draws distinctions *among* religions to heightened scrutiny under the Equal Protection Clause; it has indicated that a classification distinguishing between religion and non-religion should be evaluated under the Establishment Clause (*Larson* v. *Valente*, 456 U.S. at 246, 252). If such a statute passes muster under the Establishment Clause, there plainly is no need to subject it to heightened equal protection scrutiny. The concerns that might justify such heightened scrutiny—such as, for example, the danger of government aid to or endorsement of religion—are addressed in the Establishment Clause analysis, and any statute that passes

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[11] Appellees assert (Br. 33 n.35) that Section 702 discriminates among religions, but that claim rests upon appellees' theory that the statute may in the future be construed to exclude certain religious groups. There is no reason to believe that the courts will construe the statute in a discriminatory manner, and such a questionable assumption certainly should not be the basis for determining the constitutionality of the statute in a case where that issue is not even presented.

that analysis will not burden a fundamental constitutional right. All that equal protection requires in that context is minimum rationality. See *Lyng* v. *Castillo,* No. 85-250 (June 27, 1986), slip op. 3-4. Here, Congress has enacted an accommodation of religion that rationally advances constitutionally sanctioned goals in a manner consistent with the Establishment Clause. There is no equal protection violation.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General

MARCH 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40265

(6) (5)

No. 86-179, 86-401

Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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Appellants,

THE UNITED STATES OF AMERICA,
Intervenor,

v.

CHRISTINE AMOS, et al.,
Appellees.

On Appeal From The United States District Court For The District Of Utah

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BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF APPELLANTS

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42 U.S.C. 2000e-1 (Section 702)	*passim*

CONSTITUTIONAL PROVISIONS:

First Amendment	*passim*

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INTEREST OF AMICUS

Concerned Women for America is a national, nonprofit womens' organization of over 560,000 members. CWA works through lobbying and litigation to promote religious liberty and traditional moral values in American law and government. CWA attorneys have appeared

before this Court, see *Larry Witters* v. *Washington Department of Services for the Blind*, 474 U.S. ___, 88 L.Ed.2d 846 (1986).

At its first annual convention in September, 1984, the members of Concerned Women for America passed the following resolution:

> II. We believe that our nation's heritage of religious freedom must be vigorously maintained as the prime foundation for all of our liberties. The ever growing threat of government intervention in the affairs of churches, their schools, and the religious liberties of families must be forcefully opposed.

The members of Concerned Women for America view discrimination lawsuits against religious organizations as a growing threat to religious freedom and a subtle, yet significant breach of the wall of separation between church and state. Lawsuits like this one strip religious groups of their constitutional authority to decide whom they will hire, and give government an excuse to impose and entangle itself in the affairs of religious organizations.

The facts in this case at bar possibly could obscure these threats to religious liberties. Some may say that there is nothing "religious" about working as a janitor at a Mormon Church-run physical fitness center, or making special Mormon temple clothing at a church-run factory. Some people might find it petty, trivial, or outrageous for the Mormon Church to require that all its employees at the Deseret fitness facility and the Beehive Clothing Mills to be qualified for Temple recommends.[1] But these surface

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[1] The temple recommend signifies that its possessor is eligible to enter the Church's temples, where certain sacred ceremonies are performed. Since temple recommends are issued only to members who observe Mormon Church religious standards, they afford an administratively convenient way of identifying those who qualify for Church employment. See Jurisdictional Statement at 4, footnote 2.

facts should not be allowed to mask the critical religious liberty issues at stake here.

Concerned Women for America urges this Court to see that once the courts take jurisdiction of discrimination suits against religious groups, the courts embark on a road that will lead to a myriad of mirey entanglements in church-state questions. Ultimately, the federal courts may find themselves wrestling, as Br'er Fox did, with these tar-baby-type questions:

1. Can a Jewish synagogue refuse to hire for a janitor position a member of a white supremicist church, such as Aryan Nations or the Church of Jesus Christ, Christian?

2. Can a Jehovah Witness Church refuse to hire a non-Jehovah Witness as a secretary to the pastor?

3. Can a fundamentalist church refuse to hire a homosexual to drive a bus for its Christian private school?

4. Can a woman sue the Roman Catholic Church for sex discrimination because it does not employ women as priests?

5. Can the Internal Revenue Service revoke the Roman Catholic Church's tax exempt status, because its men-only priest theology violates public policy?

Concerned Women for America urges this Court to see the looming "backdoor threat" posed by these discrimination suits directed against religious groups. This nation's commitment to equal opportunity to all will not erode because the courts uphold the constitutional power of religious organizations to determine whom they will employ. People who decide to associate together because of common religious beliefs should be free to hire whom they want for jobs within the religious organization.

I.

THIS COURT SHOULD AFFIRM THE CONSTITUTIONALITY OF THE RELIGIOUS EXEMPTION IN 42 U.S.C. 2000E-1 (SECTION 702)

The federal court in this case, and other cases have shied away from totally upholding the constitutionality of the exemption Congress gave to religious organizations in Section 702, later codified as 42 U.S.C. 2000e-1. This section reads:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Other federal courts have tried to limit the exemption, by saying that it applies only to a religious group's leadership or teaching positions, and not to any others.[2] The district court in this case also limited the scope of Section 702 in this manner.

This skewed analysis knocks the wind out of constitutional guarantees of religious freedom and government separation from the church. The court below, and other courts, allow civil rights agencies to oversee the practices of religious organizations, to ensure that they do not

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[2] See *McClure* v. *The Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *EEOC* v. *Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *EEOC* v. *Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982), and *Rayburn* v. *Gen. Conf. of Seventh-Day Adventists*, 676 F.2d 1272 (4th Cir. 1985). See also *Feldstein* v. *Christian Science Monitor*, 555 F.Supp. 974 (D.Mass. 1983).

violate laws on equal opportunity. Such practices by government agencies intrude on a religious group's free exercise rights, and creates myriad Establishment Clause problems by regulation and investigation of religious practices.

Congress wisely eliminated those significant constitutional problems by exempting religious group hiring practices from the sweep of the Civil Rights Act of 1964, as far as basing hiring decision on religion. By passing Section 702, Congress merely accommodates the constitutional rights of religious organizations for free exercise of their beliefs, without government interference and meddling.

A. Section 702 Reflects The Government's "Duty To Accommodate" Religious Beliefs And Practices

This Court, in at least six decisions, has ruled that government accommodation of religion does not violate the Establishment Clause. When Congress passed Section 702, it merely accommodated the religious-based employment practices of religious groups from government regulation. Congress had no intention of promoting sectarian beliefs, but was merely keeping government regulators out of the church realm.

The court below ignored this strong line of precedents, and ruled that the Section 702 religious exemption impermissibly promotes religion, because it treats religious groups differently than other employers. The lower court's stilted, wooden analysis did not even address the line of decisions by this Court that state conclusively that government accommodation of religion *does not* violate the Constitution.

A quick review of the relevant decisions of this Court shows a strong support for government accommodation of

religious practices. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), South Carolina defended its denial of unemployment benefits to a Seventh Day Adventist woman, by saying that paying her when she lost her job for not working on her Saturday sabbath, would show government endorsement of her religious belief, in violation of the Establishment Clause. This Court explicitly rejected that argument

> In holding as we do, plainly we are not fostering the 'establishment' of the Seventh Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the government obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which is the object of the Establishment Clause to forestall.

374 U.S., at 409

In the similar case of *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981), this Court rejected the claim by Indiana that it must deny unemployment benefits to a pacifist Jehovah's Witness who refused to work on tank turrets at a truck factory, because paying the benefits would show government support of his religion. This Court rejected on an 8-1 vote the argument by Indiana that accommodation of religion violates the Establishment Clause. See 450 U.S. at 719-20.

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the University of Missouri-Kansas City argued to this Court that the Establishment Clause compelled it to prohibit student-led religious meetings on campus, but not other student-led meetings. This Court rejected that reasoning, saying that government accommodation of student-led religious

groups does not imply government sponsorship of religion. This Court said,

> An open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.

454 U.S., at 274

In *McDaniel* v. *Paty*, 435 U.S. 618 (1978), this Court struck down a Tennessee state constitutional provision that prohibited ministers from serving in the Legislature. Tennessee defended the constitutional provision by saying it was required by the federal Establishment Clause to keep ministers out of the Legislature. Justice William Brennan, in his concurring opinion, said,

> The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here; (citations omitted). It may not be used as a sword to justify repression of religion or its adherence from any aspect of public life.

435 U.S., at 641

Justice Brennan also said,

> The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore, subject to unique disabilities.

Id.

In *Zorach* v. *Clausen*, 343 U.S. 306 (1952), this Court upheld a time release program at a public school, which allowed children to leave the public schools for religious instruction. This Court again rejected the concept that

state accommodation of religious practices of the community's families violates the Establishment Clause:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respect the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show callous indifference to religious groups.

343 U.S., at 313-14

This Court has not only said that government accommodation of religion is permissible, it has said that the Constitution mandates a duty to accommodate religious beliefs and practices. In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), this Court said,

> [The First Amendment] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.

465 U.S., at 673

The principle articulated in this line of cases applies to the case now before the Court. Congress has a duty to accommodate the religious beliefs of groups who believe that all employees of their endeavors must share their religion. Section 702 merely accommodates that belief by religious groups, and limits the exemption to the confines of the religious organization itself.

Danger lurks in treating religious organizations "equally" by requiring nondiscrimination in the area of religion-based hiring. Such a ruling would trample their constitutional rights guaranteed by the Free Exercise Clause. In order to protect a group's religious beliefs, the

law must treat them differently, or else the law swallows up their First Amendment freedoms.

B. Narrowing Section 702 Will Create Excessive Entanglement Of Courts With Religious Bodies, In Violation Of The Constitution.

The district court applied the tripartite Establishment Clause test spelled out by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The district court found that Section 702 violated the "primary effect" part of the *Lemon* test, because it allows religious groups to make religious-based employment decisions, that other employers cannot do under the law. This brief shows in the previous section, government accommodation of religion does not have the "primary effect" of promoting religion. In fact, government has a "duty to accommodate" religious beliefs and practices, *Lynch*, *supra*.

Instead of focusing on the second prong of the *Lemon* test ("primary effect"), as the district court did, this Court should focus on the third part of the test, the excessive entanglement portion. If this Court upholds the district court's opinion, it will create a significant excessive entanglement problem, because courts will have to parse and analyze religious beliefs, and their importance to a church's hiring decisions and practices.

The lower court erroneously examined the controversy in terms of whether the Deseret and Beehive jobs were secular or religious. This improper analysis raised the excessive entanglement problems. The court had to ask, "how important is it in Mormon theology for all employees of a church-run facility to be qualified for temple recommends?" The court must then determine how important the Mormon beliefs are to the Mormons. That engulfs the

judiciary in a morass of sticky theological questions where judges do not constitutionally belong.

In the case at bar, the district court had to study Mormon Church doctrines and practices, and how they relate to the specific employment circumstances in this case. Then, the court had to judge how important these doctrines and practices are to the Mormon Church, in relation to the facts.

Under the First Amendment, the courts should not scrutinize the hiring criteria of churches. A federal district judge in Wisconsin was recently faced with a similar case, in a lawsuit brought by a woman denied a professorship in theology at Jesuit-run Marquette University in Milwaukee. In *Maguire* v. *Marquette University*, 627 F.Supp. 1499 (E.D. Wis. 1986), the judge wrote that he was essentially being asked by the plaintiff to decide whether she is a good Catholic or not, and suitable for a professorship. The judge refused to do so:

> Such an inquiry would require the Court to immerse itself . . . into definitions of what it is to be a Catholic. That question is one of the First Amendment leaves to theology departments and church officials, not federal judges.

627 F.Supp., at 1499

This Court should see this case as an opportunity to uphold the separation of church and state, by getting federal judges out of the business of examining church doctrines, and how they relate to church hiring practices.

This Court recently had a taste of those type of entanglement problems in *Ohio Civil Rights Commission* v. *Dayton Christian Schools*, ___ U.S. ___, 106 S.Ct. 2718 (1986). This Court could see the looming Establishment Clause quagmire if courts are allowed to examine

religious practices and doctrines in order to eliminate perceived employment discrimination. Although this Court disposed of *Dayton Christian Schools* on procedural grounds, the constitutional problems remain in the facts. Specifically, government investigation and enforcement of civil rights laws against religious organizations snares the government into intimate involvement with religious affairs. Inevitably, courts must make value judgments about the relative importances of religious beliefs, as applied to specific religious group occupations. This is not permitted under the Constitution.

Concerned Women for America understands and supports this nation's commitment to equal opportunity for all. But this nation also has a constitutional commitment to religious freedom and separation of church and state. The federal courts have been wrong to limit the scope of Section 702. The judicially-constructed limitations of this section do not eliminate an Establishment Clause violation, but restrict Free Exercise protections. This Court should protect religious groups from any unrestrained zeal by courts or administrative agencies to punish religious groups for "discrimination." In reality, such actions transgress First Amendment freedoms, and subdue churches under government oversight of their hiring policies.

This nation's commitment to equality will not erode because religious groups can refuse to hire people not meeting their religious standards. If this segment of society retains its powers under Section 702, it will not unleash a torrent of discrimination in society. Indeed, it may foster more respect for religious liberties.

This Court has oft used the phrase, "separation of church and state," to describe the substance of the Estab-

lishment Clause and the Free Exercise Clause. This Court has vigorously enforced this constitutional principle to keep the church out of the state. To mix a metaphor, the wall of separation is a two way street. State involvement in church affairs is just as prohibited as church control of the state. The government should not impose its public policy values of hiring criteria on religious groups.

CONCLUSION

This Court has in the past recognized the dangers of government entanglement with religion, which arise from court determinations of adherence to church doctrine and belief (see, e.g., *Presbyterian Church* v. *Hull Church*, 393 U.S. 440 (1969). The Establishment Clause and the Free Exercise Clause protect religious organizations from government interference. This Court should not abandon those principles in this case.

Date: December 19, 1986

Respectfully submitted,

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Nos. 86-179 and 86-401

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et. al.*,

and

UNITED STATES OF AMERICA,
Appellants,

v.

CHRISTINE J. AMOS, *et. al.*,
Appellees.

On Appeal from the United States District Court for the District of Utah

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BRIEF OF THE AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICUS

The American Jewish Congress is an organization of American Jews founded in 1918. It has as its purpose the defense of the civil, political, economic and religious rights of American Jews, particularly the right to religious liberty. Because strict compliance with the Establishment Clause is an indispensible requirement for religious liberty, AJCongress has filed numerous briefs in cases arising under the Clause urging that government abide by its restraints.

In its view, however, the statute at issue here does not violate the Establishment Clause. While the Congress was not required to enact an exemption as broad as the one presently contained in §702, Congress nevertheless did not act unconstitutionally in enacting the broad

exemption that the District Court held unconstitutional. Because the decision below does not advance, but limits religious liberty by confining the permissible scope of accommodation to that mandated by the Free Exercise Clause, and by assigning too narrow a role to religion, AJCongress is filing this brief with the consent of the parties.

SUMMARY OF THE ARGUMENT

1. The District Court invalidated §702 as an establishment of religion on the ground that it aided religion, because it failed to observe the essential distinction between toleration of permitted discrimination and its sponsorship by government. If §702, in fact, required religious discrimination it would be unconstitutional. However, §702 does nothing of the sort, merely allowing private discrimination.

2. Statutes such as §702 having only an incidental effect of advancing religion are not unconstitutional. Because the discrimination sanctioned by §702 is the result of purely private decision-making, the presence of an independent decision-maker, as in Witters v. Washington, and Mueller v. Allen, dissipates the constitutional significance of the antecedent governmental action.

3. While the Establishment Clause is violated if uniquely government powers are conferred upon religious institutions, Larkin v. Grendels Den, §702 confers no such powers. The power to hire or fire, or set terms on conditions of employment is not a uniquely governmental power. This is particularly true of the federal government which is explicitly forbidden to discriminate on the basis of religion. Constitution Art. VI, §3.

4. That §702 repealed a narrower exemption does not change the result. Nothing in the Constitution prohibits the simple repeal of a civil rights statute, let alone an adjustment in its scope.

5. The Constitution prohibits not only the reality of government support for religion, but also the appearance of such support. However, in evaluating whether the appearance of endorsement exists, it is necessary to bear in mind the values

that the Free Exercise Clause protects. When measured against these twin values, §702 passes constitutional muster. The American political tradition recognizes that the quid pro quo of the ban on establishments of religion is the relative freedom of churches from regulation. Church exemptions are quite common in American law for just this reason.

6. The District Court, in evaluating whether the expanded §702 might be justified as necessary to protect the Free Exercise rights of religious institutions, looked to whether other secular institutions provided the same services. This was error, for courts may not thus set themselves up in judgment on the theology of religious institutions.

7. Social welfare institutions, such as Deseret Gymnasium, do in fact serve important religious purposes. They

demonstrate that religion has a role to play in all of life's activities, and they allow religious teachings to be transmitted other than by formal preaching. In addition, they foster a sense of community among believers. For all these reasons, voluntary religious social welfare institutions have always been an important element on the American religious scene.

8. By allowing such institutions to set their own employment standards, Congress recognized that adherence to common religious values could be helpful in creating a religious atmosphere necessary to carry out these community creating functions.

9. The District Court correctly found that §702 had a secular purpose. Adjusting the relationship between church and state to take into account the demands of the Free Exercise Clause is a secular purpose.

10. The District Court recognized that §702 minimized entanglement between church and state. However, because it found that the narrower exemption did not create excessive entanglement, it held that the 1972 amendment was nevertheless unconstitutional as being broader than necessary. In so doing, the lower court ignored this Court's teachings that the minimization of entanglement is a positive constitutional value, which argues in favor of the constitutionally broader rule.

11. Moreover, the District Court's analysis puts legislatures into a straight-jacket. In enacting statutes exempting religious institutions, they must either discern precisely the demands of the Free Exercise Clause or have their efforts invalided as establishments of religion. Such a test not only too severely restrains the operating latitude

of the legislature, but given the multiplicity of sects active in the United States, and their varied religious requirements would be impossible to meet.

12. Appellees are simply wrong when they assert that all exemptions are constitutionally suspect. While not every exemption is constitutional--and if §702 were to be applied to commercial establishments it would not be--such exemptions are a necessary and important part of our constitutional tradition. Exemptions which create religious gerrymander are also impermissible, but §702 is not vulnerable on this ground.

ARGUMENT

INTRODUCTION

Acts of Congress came before the courts clothed with a strong presumption of constitutionality, Rotsker v. Goldberg 453 U.S. 57, 64 (1981). The District Court here did not accord the exemption now contained in §702[1] of the 1964 Civil Rights Act, as amended, the benefit of that presumption.

The court below first determined that the earlier version of §702 was constitutional, and that Deseret Gymnasium did not qualify for exemption under it. Only then did it consider the expanded version of §702 holding that, contrary to the legislative

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[1] Also at issue in this case is Utah Code Ann. §34-35-2(5)(1983) which wholly exempts religious institutions from Utah's anti-discrimination laws. This statute is constitutional at least to the extent that §702 is constitutional.

determination, it was unnecessary to protect the legitimate interests of religious institutions and that therefore the statute had the impermissible effect of advancing religion.[2]

This conclusion was, as a matter of law, erronecus. The absence of a coherent rationale for the result reached by the Court below in its opinion, or the opinions of the other courts which have considered the constitutionality of §702, suggests that the objections to this statute are not ones of constitutional law, but of public policy. The Congress is the proper forum for resolution of those claims.

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[2] Throughout this brief, the term "religious institutution" is used as a substitute for the statutory phrase "religious corporation, association, educational institution or society..."

I. THE REFUSAL TO BAN RELIGIOUS DISCRIMINATION DOES NOT ESTABLISH RELIGION

The District Court applied the three part test of Lemon v. Kurtzman, 403 U.S. 602 (1971) to §702 and concluded that the section, as amended in 1972, violated only the effect prong of that test. It concluded both that the broad exemption constituted governmental support for religious discrimination.

The essential error of the District Court was its failure to distinguish between discrimination commanded, enforced or actively encouraged by government, Estate of Thornton v. Caldor, 105 S.Ct. 2914 (1985); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970), or which is possible only because of the transfer of uniquely governmental powers to a private religious entity, Larkin v. Grendel's Den, 459 U.S. 116 (1981), on the one hand, and the mere toleration of

private discrimination on the other, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Adickes v. S.H. Kress & Co., supra, 398 U.S. at 166-67.[3]

Thus, the District Court remarked, paraphrasing Lemon v. Kurtzman, supra, 403 U.S. at 619 (1971), [74a][4] that "Congress must be certain, given the religion clauses, that by enacting an exemption it does not grant power to religious authorities to establish a religion..." (emphasis added). Likewise, it observed that, in enacting the expanded version of §702, "the government has given religious organizations the authorization to exercise...coercive power." (3a)

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[3] Indeed, private religious discrimination oft-times enjoys constitutional protection, Norwood v. Harrison, 413 U.S. 836 (1973).

[4] Unless otherwise noted, all citations are to the Appendix to the Jurisdictional Statement and are noted as ___a.

In a similar vein, the court below observed [67a] that invalidating the expanded version of §702 "keeps religious institutions from being permitted to burden the free exercise rights of nonmembers who seek employment in nonreligious jobs." Since the Free Exercise Clause does not regulate the affairs of private entities ex propio vigore, this conclusion must be based on the assumption that any discrimination permitted under §702 must be ascribed to government.

A. Private Discrimination Permitted Under §702 Is Not The Direct Result Of Governmental Action.

Section 702 itself neither encourages, commands, or endorses religious discrimination; it merely fails to ban it. Only statutes with a direct and immediate effect of advancing religion fail under the Establishment Clause, Lynch v. Donnelly, 104 S.Ct. 1335

(1984). "Not every law that confers an 'indirect,' 'remote' or 'incidental' benefit upon [religion] is for that reason alone, constitutionally invalid," Pearl v. Nyquist, 413 U.S. 756, 771 (1973). The employment decisions of which appellees complain are not the direct result of what Congress did when it expanded §702 to cover all employment by religious institutions; rather, the appellees complain of Deseret's private decisions, made in keeping with its own religious understanding and commitments.

Twice in the last five years, this Court has refused to find an impermissible effect in circumstances in which government funds flowed to religious institutions only as a result of voluntary private decision-making, Witters v. Washington, 106 S.Ct. 748, 752 (1986); Id. at 754 (Powell, J.,

concurring); Mueller v. Allen, 463 U.S. 388, 399 (1983). The presence of such intervening independent decision-making dissipates the constitutional significance of the antecedent governmental action.

Here, the government action is yet more benign, still further removed from, and no less independent of the actions of Deseret, than the subsidy of religious education upheld in Witters and Mueller; it consists solely of a refusal to outlaw certain employment decisions. This surely is not a "direct and immediate" advancement of religion.

Because §702 is permissive only, the distinction between §702 and Estate of Thornton v. Caldor Inc., supra, is evident. There, a Connecticut statute "decreed that those who observe a Sabbath...must be relieved of the duty to work on that day no matter what burden...

this imposes on the employer or fellow workers," 105 S.Ct. at 2917 (emphasis added). It was the state mandated compulsion to aid the religiously observant that led to the invalidation of that measure as having a direct and immediate effect of advancing religion.[5]

By contrast, §702 compels no religious institution to discriminate in employment. Any religious institution which wishes to hire truck drivers, building engineers, or, indeed, ministers of any or no faith may do so. Section 702 merely confirms the freedom of

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[5] Similarly, in Moose Lodge No. 107 v. Irvis, supra, this Court invalidated a regulation of the Pennsylvania Liquor Control Board as applied to a club with racially discriminatory guest policies. The regulation required private clubs holding liquor licenses to strictly enforce membership and guest rules. The effect of the rule was to require racial discrimination in violation of the Equal Protection Clause.

religious institutions which do wish to consider religion criteria in hiring to do so.

Appellees' contention that §702 empowers religious institutions to 'extort' contribution from employees, Motion to Dismiss at 17, is misconceived. Such contributions may be sought by some religious institutions as a condition of continued employment. Such 'extortion,' although it may be illegal under anti-kickback statutes, see, e.g., N.Y. Labor Law §198-b, cannot be attributed to the government by virtue of §702. Absent a direct nexus between the statute and the alleged religious 'coercion', the Constitution is not violated merely because §702 allows religious institutions to do what would be legal in the absence of the statute and illegal in the absence of the exemption.

B. That Congress Partially Repealed The Ban on Religious Discrimination Does Not Establish Religion

No different result is called for merely because between 1964 and 1972 Title VII banned religious discrimination by religious institutions in their 'secular' hiring. The mere repeal of an anti-discrimination statute is not an unconstitutional sanction of discrimination, and hence, in Establishment Clause terms, does not have a direct and immediate effect of advancing religion. Any other rule would "be destructive of a State's democratic processes and its ability to experiment," Crawford v. Bd. of Educ., 458 U.S. 527, 535 (1982).[6]

C. §702 Confers No Uniquely Governmental Powers on Religious Institutions

Because it is permissive only, and because religious discrimination is uniquely a non-governmental function,

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[6] Neither can section §702 be invalidated on the ground that it works a

§702 does not confer any uniquely governmental powers on religious institutions. Hiring decisions are, of course, not unique to religious institutions. They are inherent in the conduct of any corporation or organization.

In Larkin v. Grendel's Inn, supra, this Court considered a Massachussets statute which empowered churches to determine whether establishments within a certain radius could be licensed to serve liquor. Invalidating that statute, this Court repeatedly emphasized that the statute had delegated the uniquely

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fundamental reallocation of political power, cf. Washington v. Seattle School Dist. #1, 458 U.S. 457 (1982). Were §702 a constitutional provision creating unusual political obstacles to the securing of rights of minority groups, a different case would be presented. But §702 is ordinary legislation, repealable by simple majority vote of the legislature, and suffers from no such deficiency.

governmental power to issue liquor licenses to churches.[7]

A church veto of a liquor license is possible only because the state transfers a uniquely governmental power to a religious institution. By contrast, the action of a religious institution in hiring or firing employees does not depend on any non-existent grant of power embodied in §702.

Unlike traditional governmental powers, such as the power to punish criminals or to coin money, which are bestowed upon the federal government by the Constitution, the power to discriminate on the basis of religion in

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[7] "The churches power under the statute is standardless....That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors....We can assume that churches would act in good faith in their exercise of the statutory power ...yet [the statute] does not by its terms require that churches power be used in a religiously neutral way." 459 U.S. at 125. (emphasis added).

employment is the one form of discrimination forbidden to the Federal Government by the Constitution itself, Art VI, §3.

There is nothing uniquely governmental in the exemption in §702, and therefore nothing to invalidate under the Establishment Clause.[8]

II. SECTION §702 DOES NOT CREATE THE APPEARANCE OF GOVERNMENT SUPPORT FOR RELIGION

The Establishment Clause bans not only the reality of government support for religion, but the appearance of such support, Grand Rapids School Dist. v. Ball, 105 S.Ct. 3216, 3226 (1985); Wallace v. Jaffree, 105 S.Ct. 2479, 2503-05 (1985) (O'Connor, J., concurring); Lynch v. Donnelly, 104 S.Ct

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[8] Deseret is not a company town, so as to call into play the rule of Marsh v. Alabama, U.S. 501 (1946); cf. State v. Celmer, 80 N.J. 405, 404 A.2d 1 (1979).

1355, 1367-69 (1984) (O'Connor, J., concurring); Larkin v. Grendel's Den, supra; Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 So.Cal.L.Rev. 450 (1986). It is therefore necessary to inquire whether, notwithstanding the fact that the expanded §702 confers no actual power on religious institutions, nor compels any institution to engage in religious discrimination, it is perceived as granting some impermissible special status to religion.

However, such an inquiry must take into account the fact that the Free Exercise Clause itself requires special treatment of religion, Wallace v. Jaffree, supra, 105 S.Ct. at 2504, (O'Connor, J., concurring), and that such treatment does not violate the Establishment Clause, Thomas v. Rev. Bd., 454 U.S. 707, 719-20 (1981).

Wallace v. Jaffree, supra, 105 S.Ct. at 2491, n.45, explains that a statute can be labelled an accommodation only if it removes a governmental barrier to the free exercise of religion. The silent prayer statute was not such a statute, for its intent was to affirmatively encourage students to pray--a quintessentially religious practice--not to remove a non-existent prohibition on student's voluntary prayer.

Section 702, by contrast, is an accommodation statute since it removes a substantial barrier to the autonomy of religious institutions--the right to determine who will be its employees and who will implement its religious purposes. Cf. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

As Justice O'Connor explained in Wallace v. Jaffree, supra, 105 S.Ct at 2504, the Establishment Clause inquiry

into a statute which attempts to accommodate religion must be somewhat different from the ordinary Establishment Clause inquiry:

> In assessing the effect of such a statute--that is, in determining whether the statute conveys the message of endorsement of religion...courts should assume that the "objective observer"...is acquainted with the Free Exercise Clause and the values it promotes.

The objective observer cannot conclude that, in broadening the §702 exemption, Congress endorsed religion. First, as noted above at p. 5, §702 "endorses" nothing; it merely permits certain private conduct.

Second, even if "endorsement" exists when religion is accorded unreasonably preferential treatment, no such treatment occurred here. Section 702 does not give religious institutions carte blanche to engage in prohibited discrimination,

placing them wholly outside of Title VII.[9] While religious institutions frequently practice, for example, sexual discrimination, §702 does not grant them absolution from the sex-bias prohibition of Title VII. Rather, Congress precisely targeted the exemption to the type of discrimination regarded by the public as within the prerogative of a religious institution-- religious discrimination-- and banned other forms of discrimination, reaffirming that religious institutions are not wholly above the law.

Section §702 does allow not-for-profit religious institutions to practice religious discrimination. Whether or not Congress could constitutionally ban all religious discrimination by religious

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[9] To the extent that this fact is relevant, the Utah statute at issue here may stand on a different footing from §702.

institutions,[10] the objective observer, knowledgable about the American tradition of separating church and state, would surely not be suprised that, in keeping with that tradition, government refused to regulate religious discrimination by religious institutions.

Nor would that objective observer assume that the message sent by §702 was

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[10] See generally, E.E.O.C. v. Freemont Christian School, 781 F.2d 1362 (9th Cir. 1986); Rayburn v. General Conference, 772 F.2d 1164 (4th Cir. 1985); E.E.O.C. v. Pacific Press Pub. Ass'n., 676 F.2d 1276 (9th Cir. 1982); E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980); Kings Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C. Cir. 1974); Ninth & O Street Baptist Church, 616 F.Supp. 1231 (W.D. Ky. 1985); Feldstein v. Christian Science Monitor, 555 F.Supp. 974 (D.Mass. 1983); Russel v. Belmont College, 554 F.Supp. 667 (M.D. Tenn. 1982); Larsen v. Kirkam, 499 F.Supp 960 (D. Utah, 1980); Dolter v. Wahlert H.S., 483 F.Supp. 266 (N.D. Iowa, 1980); Whitney v. Greater N.Y. Corp, 401 F.Supp. 1363 (S.D. N.Y. 1975); Minn. ex rel McClure v. Sports & Health Complex, ___ Minn. __, 370 N.W.2d 844 (1985), app dismissed, ___U.S. ___ (1986).

that government approved of religious discrimination. That would in any event be an odd conclusion about a government whose charter forbids it to engage in religious discrimination. Rather, the observer would likely perceive such an exemption as the flip side of the "separation" coin. The quid pro quo for the ban on government aid is the right of the churches to be free of government regulation. No less a personage than Roger Williams shared this view, cf. M. DeWolfe Howe, The Garden and the Wilderness (1965). And Madison, in his Memorial and Remonstrance Against Religious Assessments, wrote "that in matters of religion, no man's right is abridged by the institution of civil society, and that Religion is wholly exempt from its cognizance." (emphasis added).

Statutory exemptions of churches from a variety of regulatory laws are a common and accepted aspect of American church-state relations. Thus, religious institutions are exempt from certain taxes, e.g., 26 U.S.C. 3309(b); (unemployment tax),[11] and, alone among non-profit groups, are exempt from certain tax reporting requirements, 26 U.S.C. §6033 (a)(2)(1).[12] See generally, Whelan, "Church" in the

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11 Cf. Hollis Hills Jewish Center v. Roberts, 93 N.Y.A.D. 2d 1039, 461 N.Y.S. 2d 555 (3d Dep't 1983) (synagogue porter not covered by unemployment insurance).

12 Although the IRS had attempted a narrow construction of the exemption to churches and church-like institutions, these efforts have so far been rebuffed by the lower federal courts which have construed the exemption to apply to social welfare institutions operated under religious auspices. Tennessee Baptist Children's Home v. U.S., ___ F.2d ___ (6th Cir. 1986); Lutheran Social Services v. U.S., 758 F.2d 1283 (8th Cir. 1985); Lutheran Childrens & Family Service of Eastern Pa. v. U.S., ___ F.Supp. (E.D. Pa. 1986).

Internal Revenue Code: The Definitional Problem, 45 Fordham L.Rev. 885 (1977).

This Court has construed the National Labor Relations Act not to apply to religious schools, N.L.R.B. v. Catholic Bishop, 440 U.S. 490 (1979). Most states, including Utah, exempt religious institutions from at least portions of their anti-discrimination laws, see, Dayton Christian Schools v. Ohio Civil Rights Comm'n., 766 F.2d 932, 941-42, n.18 (6th Cir. 1985), rev'd on other gds., 106 S.Ct. 2718 (1986) (collecting statutes).

Senator Ervin, quoted by the District Court at 26a-39a, sponsor of the legislation now under attack and himself a widely recognized expert on constitutional law, did not stray from the popular understanding of the limitations of government when he defended §702 as essential to maintain

the separation of church and state.

Separation is not a one way street, barring only aid to religion; it forbids the state to intrude upon the internal affairs of churches. Section 702 is wholly consistent with that understanding, and hence is not popularly understood as conveying a message that adherents of religion enjoy preferred status in the community.

III. THE DISTRICT COURT ACCORDED TOO NARROW A SCOPE TO THE FREE EXERCISE CLAUSE

The District Court found that government regulation of Deseret's "secular, non-religious activities" (54a) would not infringe on its Free Exercise Clause rights, that the exemption for secular employment contained in §702 was therefore far broader than necessary, and hence that it unconstitutionally established religion. It cited with approval [68a] the opinion of the

District of Columbia Circuit in Kings Garden Inc. v. F.C.C., supra, 498 F.2d at 57, in which that court suggested, but did not hold, that §702 was unconstitutional:

> It is conceivable that there are "many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all embracing secularism" ....But it hardly follows that the state may favor religious groups when they themselves choose to be submerged for profit or for power, in the 'all-embracing secularism' of the corporate economy. (emphasis in original)

Deseret Gymnasium, however, is not a profit-making or profit-seeking enterprise. Deseret was not incorporated as a for-profit business; it is, and always has been, an integral part of the not-for-profit Mormon Church. For several years, Deseret has operated at a loss and has been subsidized by appellants. [11a-18a].

Moreover the District Court committed a fundamental error of law in evaluating whether Deseret was a 'religious' corporation, association or society. It determined whether Deseret was secular by inquiring whether similar, but wholly non-religious, facilities exist. "Deseret offers the same facilities and services that are available in other gymnasiums, and the employees perform the same jobs that are performed at any public gymnasium or athletic club." [15a].

Policies that were instituted in keeping with appellants' religious beliefs were explained away by the District Court as equally consistent with secular health concerns as with religious precepts: "Deseret's no smoking rule is as consistent with the beliefs of athletics as it is with the beliefs of the Mormon Church." [15a].

The District Court thus improperly arrogated to itself the right to dismiss the religious motivations of the appellants. "[Men] may not be put to proof of their religious doctrines or beliefs." U.S. v. Ballard, 332 U.S. 78, 86 (1944). The comparative mode of analysis adopted by the District Court leads to the conclusion that the secular departments of parochial schools are secular, and may receive governmental aid because they teach the same courses, sometimes using the same books, as do the public schools, cf. Lemon v. Kurtzman, supra.

Appellants assert, and it appears sincerely, that they operate Deseret as a part of their religious mission. Deseret's "day was to begin with humble

prayers," to insure[13] "that whatever is done by way of exercise, training and recreation...will be done in the spirit of prayer and obedience of Thy commandments." Because Courts are not arbiters of scriptural interpretation, Thomas v. Rev. Bd., supra, 450 U.S. at 715-16, they must accept assertions of the religious nature[14] of an activity unless the "asserted claim is so bizarre,

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13 From the dedicatory prayer offered in 1911, cited by the District Court at 13a-14a.

14 Appellants operate profit-making businesses, but properly do not seek the benefits of §702 as to those businesses. See Defendant's Memorandum of Law in Opposition To The Plaintfiff's Motion for Summary Judgment, Defendants Statement of Fact Pursuant to (Local) Rule 5E at ¶D-13. See also In Re Application of Chronicle Broadcasting, Co., 59 F.C.C. 2d 335 (1976) (radio station owned by Mormon Church). A state provision similar to §702 was held inapplicable to a profit-seeking business in Minnesota ex rel. McClure v. Sports and Health Complex, ___ Minn. ___, 370 N.W. 2d 844 (1985).

so clearly non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause." Thomas v. Rev. Bd., supra, 450 U.S. at 717.

Before the Enlightenment took full hold, Western society was pervasively religious. Religious institutions either regulated or hosted all of life's important activities. The Enlightenment completed the process, perhaps begun

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But even if §702 does sweep so broadly as to include for-profit businesses, it does not follow that, as to such businesses, §702 would be constitutional, Roberts v. U.S. Jaycees, 104 S.Ct. 3244, 3251 (1984); Id. at 3258 (O'Connor, J., concurring). See generally, Forest Hills Early Learning Center v. Lukhard, 729 F.2d 230 (4th Cir. 1984), after remand, ___ F.2d __ (4th Cir. 1986); Tony and Susan Alamo Foundation v. Secretary of Labor, 105 S.Ct. 1953 (1985).

earlier, of carving out secular and sacred spheres.[15]

Change, of course, did not come all at once nor is the process total even yet. Voluntary association under religious auspices met, and may continue to meet many social needs in a society where religion and state are separate,[16] including education, social welfare, and (in institutions such as the YMCA, YMHA's or Jewish Community Centers) recreation.[17]

The tendency of modernity is to confine religion to the mosque, church or

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15 See, L.A. Cremin, American Education: The Colonial Experience (1970); S. Ahlstrom, A Religious History of the American People, ch. 22 (1972); R.T. Handy, A Christian America; Protestant Hopes and Historical Realities, p. 15-21 (2d ed. 1984).

16 S. Ahlstrom, A Religious History of the American People, supra, at 422-28, 742-43; R.T. Handy, A Christian America: Protestant Hopes and Historical Realities at 27-42; B.J. Coughlin, Church and State in Social Welfare (1965); P.W. McBride, Culture Clash: Immigrants and Reformers, ch. IV (1975).

synagogue. So confined, religion loses contact with the hurly-burly of the real world; to the degree religion is unrelated to all of life, it is at a serious disadvantage.

Institutions such as Jewish Community Centers or Deseret Gynmnasium demonstrate that even today religion has a relationship to all of life's activities. Such institutions allow religions to spread its teachings other than by formal preaching. Such institutions also help create a sense of community among believers, and illustrate the beauty of the "faith-community" to the non-believer. They therefore directly contribute to the advancement of faith.

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17 Solender, The Place of the Jewish Community Center in Jewish Life; R. Morris and M. Freund, Trends and Issues in Jewish Social Welfare in the United States (1966); D.I. MacLead, Building Character in the American Boy (1983) 261-64.

While many, perhaps most, faiths find it possible, indeed morally and religiously desirable, to fulfill these functions without engaging in widespread religious discrimination, others, including appellants, apparently believe that the sense of religious community, of common religious purpose, of striving towards common religious goals, and of commitment to common religious values, is necessary, or at least helpful, in creating a religious atmosphere so that otherwise mundane activities can be sanctified.[18]

The District Court [68a-69a] recognized that the Constitution permits,

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18. In Grand Rapids School District v. Ball, supra, this Court indirectly recognized this. There, the Court invalidated a program in which the state paid for, inter alia, parochial school gym teachers to teach after school physical education courses on the ground that the teacher may "tailor the content of the [physical education] course to fit the school's announced goals."

and oft-times requires, exemption "to protect religious organizations from the burdens of secularism." School Bd. of Abington Twshp. v. Schempp, 374 U.S., 203, 306 (1963) (Goldberg and Harlan, concurring). Cf. Goldman v. Weinberger, 106 S.Ct. 1310, 1314 (1986) (Stevens, J., concurring). Section 702 is designed to insure precisely that an exemption is available to all groups who could be thought within its natural perimeters.

The District Court failed to recognize that its description of Deseret as a secular institution, and its view about the absence of a justification for a religous qualification for a building engineer, are products of the very 'pervasive secularism'--one of whose chief components is the elimination of irrational decision-making in employment--which the Constitution does

not tolerate as government policy. At a minimum, the religion clauses permit government to refuse to impose that pervasive secularism on religious institutions.

Yet another fundamental error of the District Court's closely tying the constitutionality of exemptions to the requirements of the Free Exercise Clause is that it creates a constitutional straight-jacket for legislatures: either limit religious exemptions to precisely what the Free Exercise Clause requires or transgress the Establishment Clause.

That analysis is inconsistent with America's constitutional tradition both because it unduly contracts the operating latitude of the legislature and because it does not work in a society where religious expression takes so many variegated forms that the legislature cannot predict in advance the impact a

statute will have on religious institutions. If not every accommodation is permissible, Estate of Thornton v. Caldor Inc., supra; Wisconsin v. Yoder, 406 U.S. 205, 221 (1972), it is nevertheless true that:

> [T]he limits of permissible state accommodation to religion are by no-means co-extensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. (citations omitted).

Walz v. Tax Comm'n, supra, 397 U.S. at 669-70. Compare Braunfeld v. Brown, 366 U.S. 599, 608 (1961) (no Free Exercise Clause claim to exception from Sunday Blue Laws) with Arlans Dep't Store v. Ky., 371 U.S. 218 (1962) (states may grant such exemption without establishing religion).

There is thus no basis for appellees' contention, citing Yoder that "religious exemptions are constitutionally suspect."

Appellees' Motion to Affirm at 15. Appellees' citation to Wisconsin v. Yoder is puzzling, since that case emphasizes the importance of exemption in the American constitutional tradition.

That exemptions are not inherently suspect does not mean that every exemption is constitutional, Wisconsin v. Yoder, supra. An exemption which embodies a religious gerrymander does not pass constitutional muster, Larson v. Valente, 456 U.S. 228 (1982). The relevant inquiry was stated by Justice Harlan, concurring in Walsh v. United States, 398 U.S. 333, 357 (1970):

> The implementation of the neutrality principle of these cases requires..."an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the scope of legislation encircles a class so broad that it can be fairly concluded that

> [all groups that] could be thought to fall within the natural perimeter [are included]." (citations omitted).

Section 702 meets this standard, notwithstanding the fact that its categorical exemption is not available to non-religious institutions. Congress could have concluded that it was unlikely that a non-religious institution would routinely have any legitimate interest in discriminating on the basis of religion, and relegating such institutions to the bona fide occupational qualification defense.

Appellees argue, Appellees' Motion to Affirm at 15, that the statute violates "a strong national policy to apply important federal labor laws, such as Title VII, to religious organizations absent a compelling First Amendment reason not to do so," and cites cases upholding Congress' decision to extend

partial Title VII coverage to religious institutions. The District Court made a similar argument [55a-57a].

There are two answers to this argument. First, Congress, not appellees or the District Court, is charged with assessing and setting national policies. It reasonably found that there is no compelling national policy in eliminating religious discrimination by religious emmployers, or at least, that another compelling national policy, that of religious freedom, outweighs the national fair employment policy. That determination involves assigning relative weights to each policy--a determination particularly within the competence of the democratic institutions of government.

Second, most forms of labor legislation are less intrusive than fair employment laws. Wage and hour laws, cf. Tony & Susan Alamo Foundation v.

Secretary of Labor, supra, or occupational safety laws, affect only the cost of employment, but do little to change the essence of the employer's business. Fair employment laws regulating who will act on behalf of a religious institution have a far greater impact on the institution's operations.

It is likely, perhaps even certain, that in its expanded form, §702 will in some cases stretch further than constitutionally necessary or desirable. But it is equally certain that the 1964 statute would have resulted in erroneous denials of exemption. Given the constitutional imperatives mandating the independence of religion from government, Congress could reasonably conclude that the risk of error should not fall on religious institutions.

All that is left of appellee's claim that all exemptions are unconstitutional

is that exemptions are available only to religious institutions, but not non-religious institutions. That form of preference is inherent in the text of a Constitution which singles out religion for special treatment. Wisconsin v. Yoder, supra, 406 U.S. at 215-16.

IV. SECTION 702 HAS A SECULAR PURPOSE

Although appellees contend that the 1972 amendment had a sectarian purpose, Motion to Dismiss at 10-15, the District Court correctly rejected that argument. While perhaps not required by the Free Exercise Clause, §702, by insuring the autonomy of religious institutions, and enabling them to create a miniature religious community, surely advances Free Exercise values. As Justice O'Connor suggested in Wallace v. Jaffree, supra, 105 S.Ct. at 2504, the Congressional purpose to advance Free Exercise values

is a substitute for, or more accurately is, a valid secular purpose.

This statute, unlike the silent prayer statute invalidated in Wallace v. Jaffree, is not a subtle legislative suggestion that religious discrimination is a good idea. Congress had, as the legislative history quoted above, p. 21, supra, suggests, no such intent; rather it had resolved only to leave the question of whether to discriminate to religious institutions. That is not an impermissible religious purpose.

V. THE MINIMIZATION OF ENTANGLEMENT IS AMPLE JUSTIFICATION FOR §702

The District Court acknowledged that the Free Exercise Clause requires that religious institutions be permitted to discriminate on the basis of religion in employment either where the entity teaches the "religious rituals or tenets" of the church [10a, 71a] or where the job

involves "the religious rituals or tenets of the religious organization or matters of church administration" [11a].

It acknowleged, moreover, that the expanded 1972 exemption minimized entanglement: [74a-75a]

> [t]he exemption was designed to minimize involvement and entanglement between church and state and to ensure that the government and courts do not go through the rigors of inspecting and analyzing whether the religious entity is engaging are religious or secular, thus avoiding an intimate and continuing relationship between church and state.

This finding led the District Court to conclude that the expanded §702 did not create undue and unconstitutional excessive entanglement. Id. However, the court also held that the narrower 1964 statute would not create undue entanglement and that such a statute would meet all the legitimate needs of religious institutions, [45a-52a]. The

court held that the 1964 exemption [10a-11a] required application of a complex, and difficult to comprehend, inquiry into: 1) corporate and financial structure; 2) the religious function of the employer; and 3) the religious nature of the job.

The District Court concluded that, since a narrow statute would adequately vindicate the Free Exercise Clause, and would not create the impermissible effect the District Court thought inhered in the enlarged §702, the less restrictive means test of the Establishment Clause, Larkin v. Grendel's Den, supra, 459 U.S. at 123; McGowan v. Md.; 366 U.S. 420, 499-50 (1961),[19] required it to strike the broader exemption.

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19 The plurality in Lynch v. Donnelly, supra, 104 S.Ct. at 1363, n. 7, did, however, suggest in a cryptic note, the demise of the alternative means test in the Establishment Clause context.

The District Court's analysis is flawed in several respects. First, its conception of what constitutes the religious mission of a church is, as already noted, supra p. 26, fatally deficient and narrow. It is simply not true as either a matter of law or fact that, "the primary purpose of religious organization...is to carry on religious rituals, teach religion doctrines and proselytize." [71a]

Second, while the Court acknowledged that the 1972 amendments of §702 minimized entanglement between church and state, it failed to grasp the constitutional significance of that fact. Where government must choose between alternatives affecting religious institutions, its choice of one which minimizes entanglement is entitled to substantial deference because that choice

furthers important constitutional values.

The District Court was plainly correct in concluding that §702 as it presently stands minimizes entanglement. The record in this case belies any other conclusion. Among the original plaintiffs were employees of Beehive Industries, a church-owned garment factory, producing religious garments worn by devout Mormons.

The District Court concluded that "the record is not sufficient to form the basis for a ruling on the religious nature of Beehive or the job of the plaintiffs who were employed there [18a-19a). It accordingly ordered further discovery in at least six areas, many of which involved or touched upon religious matters [18a-19a]. That discovery produced evidence, including numerous internal church documents, and

affidavits from numerous church officials. In this way, a simple discrimination case turned into a sweeping investigation of Deseret's sponsoring church, its doctrines and activities.

In regard to yet another plaintiff (a truck driver employed by a church-operated sheltered workshop) the District Court concluded, after an extensive review of various church documents, that the employer was religious, and that the employee's position had religious implications and hence was exempt under the earlier version of §702 [108a-116a].

Congress could reasonably conclude that such inquiries into the activities of religious institutions were undesirable, if not unconstitutional, and that the federal courts should not be required, or allowed, to engage in such inquiries. Surely, it was reasonable for

Congress to conclude that a test which allows a religious institution to discriminate in the hiring of a truck driver, but not a building engineer, is not desirable.

The legislative history, recited by the District Court, [25a-39a], indicates that, indeed, minimizing entanglement was precisely Congress' concern. Senator Ervin, sponsor of the expanded version of §702, remarked (reprinted at 37a):

> I respectfully submit that we do not erect a wall of separation between church and state when we permit the agents of the state to tell a religious corporation, a religious association, a religious educational institution, or a religious society, whom it is to employ for any purpose, whom it is to promote for any purpose, or whom it may discharge for any reason.

This Court has at least twice noted that blanket treatment of religion advances Establishment Clause values. Walz v. Tax Comm'n, 397 U.S. 664, 674

(1970), upheld the constitutionality of a real estate tax exemption for religious institutions, without regard to whether they engaged in exempt social welfare activities:

> We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others....Churches vary substantially in the scope of such services; programs expand or contract according to resources and need....Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Conversely, in Bob Jones University v. U.S., 461 U.S. 574, 604, n.30 (1983), a case in which Congress extended a regulation to religious, as well as all other not-for-profit institutions, rather than make exemption dependent on a showing of religious motivation, this Court rejected an Establishment Clause challenge to a rule denying a religious

practicing religiously motivated racial discrimination a tax exemption in part because:

> the uniform application of the rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of a sincere religious belief.

The District Court attempted to avoid this analysis by noting that, unlike the situation in Walz, there was no long history of use of anti-discrimination laws to harass churches, as there was a history of doing so with tax laws. This was error. First, no such history was present in the Bob Jones case. Second, Walz does not turn on history, but on the policy of minimizing entanglements, Pearl v. Nyquist, supra, 413 U.S.at 794.

Moreover, the District Court's history is myopic. It is only recently that Congress and the state legislature passed comprehensive fair employment laws. Until then, religious institutions were free to (and did) discriminate. And when fair employment laws were ultimately enacted, they typically contained at least partial, and in the case of Utah, total exemptions for churches. There was, until recently, no possibility of using anti-discrimination laws to harass churches.

The expansion of §702 to encompass both religious and secular employment surely minimizes entaglement. The expansion furthers the "overriding interest in keeping the government--whether it be the legislature or the courts--"out of the business of evaluating the relative merits of different religious claims," Goldman v.

Weinberger, supra, 106 S.Ct. at 1316, n.6 (Stevens, J., concurring). It avoids seemingly irrational distinctions, such as that drawn below between a building engineer and a truck driver. Given the admitted need for at least some exemption for religious institutions, §702 ensures that all who should be able to invoke an exemption can do so.

CONCLUSION

Religious discrimination, like other forms of discrimination, has become an anachronism for most Americans. The secular ethic no longer will allow characteristics irrelevant to job performance to play a role in employment. Senator Harrison Williams, the leading Senator opponent of the 1972 amendment to §702, after alluding to possible Establishment Clause problems with the amendment, urged its rejection because "of all the institutions in this country

that should be setting the example of equal employment opportunity, if on that matter in all aspects of life, it is America's religious institution." 3 Legislative History of the Equal Employment Opportunity Act of 1972 at 1666.

The egalitarian principle of non-discrimination is well ingrained in secular thought, but is foreign to much religious thought. The mandatory application of Title VII's ban on religious discrimination to religious institutions, on the ground that exemption favors religion, would be an example of the "untutored devotion to the concept of neutrality which partake[s]... of a brooding and pervasive devotion to the secular and a passive, even active hostility to the religious," School Bd. of Abington Twshp v. Schempp, supra, 374 U.S. at 306 (Goldberg & Harlan,

concurring), which the Constitution condemns.

It is precisely Senator Williams' efforts to compel, allegedly in the name of non-establishment, churches to serve as models of a secular government endorsed policy, that the Congress rejected in enacting §702. That rejection embodies a recognition of the desire of some faiths to create a "total" environment. That is a difficult task. In enacting §702, Congress merely allowed religious institutions the opportunity to attempt to do so if they could.

For the reasons stated, the judgment must be reversed.

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December, 1986

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-179 and 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, *et al.*,
Appellants,

UNITED STATES OF AMERICA,
Intervenor,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeal From the United States District Court for the District of Utah

BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY, THE LUTHERAN CHURCH-MISSOURI SYNOD, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether the First Amendment prohibits Congress from allowing religious organizations to hire only members of their own faith to conduct all of their activities, including those deemed "nonreligious" under secular criteria.

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BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY, THE LUTHERAN CHURCH-MISSOURI SYNOD, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF APPELLANTS

INTEREST OF AMICI CURIAE

The Christian Legal Society is a non-profit professional association of 4,500 judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual

citizen's respect for, and allegiance to, our constitutional government.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The congregations of the Synod operate approximately 1,700 elementary and secondary schools situated in most of the states of the United States. The Synod, on behalf of its congregations, schools, and individual members, is concerned about the impact of religious principles on employment matters.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, colleges, and universities, as well as some 44,000 churches from 74 denominations. It serves a constituency of 10 to 15 million people.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

Amici adopt the statement of the case in the Brief for the Appellants.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is the first major case since *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), in which this Court will have the opportunity to address on the merits the rights of religious institutions[1] to control their own internal

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[1] Throughout this brief, we will use the term "church" as a shorthand expression for "religious organization." The term is not confined to institutions of the Christian Church, but includes synagogues, temples, mosques, and religious organizations of all faiths. Moreover, the term is not confined to institutions or houses of worship—to "churches" narrowly understood—but includes all organizations, institutions, or societies with a religious purpose. See

organization. At issue is the constitutionality of Section 702 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-1, which allows religious organizations to prefer members of their faith for employment in the organization's activities. Whether viewed as free exercise or nonestablishment—as associational freedom or separation of church and state—the principles of this case go to the core of what religious liberty means under the First Amendment.

Congress has wisely recognized that religious affiliation has a legitimate place in the hiring decisions of religious organizations, and that an attempt to confine church hiring discretion to "religious" activities creates more constitutional difficulties than it solves. To the extent that the statutory exception is wider than the minimum required under the First Amendment, it has the purpose and effect of guaranteeing "free exercise breathing space" and eliminating the need for case-by-case inquisition into the nature and sincerity of the "religious" element in church activities.

Under the district court's ruling, however, government officials charged with enforcing Title VII are required to sift through the activities of churches in order to determine (on the basis of intrusive criteria utterly foreign to the church's own perspective) which activities are "religious" and which are not. Then, according to the district court, the government must require the church to entrust portions of its activities—those deemed insufficiently "religious"—to outsiders. This intrusion into the right of religious organizations to define for themselves the scope of their religious mission, and to maintain control over their activities through religious (and not merely economic) discipline, is directly contrary to statute and in no way compelled by the First Amendment. Indeed, the values of the First Amendment are

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R. Toms, *What Is A Church? The Dilemma of the Parachurch* (1979).

far more threatened by the district court's approach than by the statute enacted by Congress.

Section A of this brief discusses the nature of the right to religious autonomy recognized by Congress in Section 702. It demonstrates that under the correct constitutional standard, the district court should have concluded that the LDS Church has the constitutional right to limit employment in the activities in this case to members in good standing of the Church. Under the facts of this case, therefore, there is absolutely no conflict between the statutory exemption and the requirements of the First Amendment.

Section B explains why the district court's reasons for invalidating Section 702 of the Civil Rights Act of 1964, under the Establishment Clause, are mistaken. It shows that the supposed "advancement" of religion feared by the court is merely the consequence of the institutional separation between church and state. Sometimes this separation is to the advantage of religion; more often it is to the disadvantage of religion; but it is not an unconstitutional effect. Congress's decision to exempt religious organizations from the religious antidiscrimination regulations of Title VII eliminates the need for case-by-case inquiries into the religious significance of church activities. While such inquiry may be unavoidable in free exercise cases, where the government has asserted an interest in enforcing a rule despite its effect on religious practice, it is not necessary where the government itself has consented to a broader exemption.

This case is one in which the two principal, and often competing, values of the Religion Clauses—free exercise and institutional separation—coincide. By declining to interfere with the religious requirements of employment within religious communities, Congress has eliminated a source of entanglement and friction between church and state, and has at the same time affirmed the inalienable right of associations of believers to define and carry out their religious missions as they see them.

ARGUMENT

THE STATUTORY EXEMPTION ALLOWING RELIGIOUS ORGANIZATIONS TO PREFER MEMBERS OF THEIR OWN FAITH IN HIRING AGENTS FOR THE CONDUCT OF ALL THEIR ACTIVITIES IS IN FULL HARMONY WITH THE RELIGIOUS FREEDOM PROVISIONS OF THE FIRST AMENDMENT

The right of appellants (the "Church" or the "LDS Church") to hire members in good standing of their own church to conduct church operations is squarely based on statute; but it is more than merely statutory. As the district court held, Section 702 of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. § 2000e-1 (the "702 exemption"), permits "religious entities [to] discriminate against employees on religious grounds with respect to *all* their activites, not just their religious activities" (J.S. App. 20a (emphasis in original)). The congressional decision to exempt religious organizations from Title VII's prohibition on religious discrimination restored churches to the separate and autonomous position they had enjoyed in this country since the end of establishment. The congressional sponsors of the 1972 amendment consciously based their proposal on an understanding of the rights of religious institutional autonomy under the First Amendment. It is the district court's ruling —confining the right to activities deemed, under secular criteria, to be "religious"—that threatens to invade the constitutional rights of appellants and every other religious organization. It is important, therefore, to review the constitutional underpinning of this statutory exemption before turning to the district court's opinion.

A. Churches Have a Constitutional Right to Hire Only Members of Their Own Faith to Conduct Activities Deemed by the Church to be Part of Its Religious Mission

The Religion Clauses of the First Amendment have a strong institutional, as well as individualistic, dimension. Religious liberty means more than being able to comply

with personal religious obligations, like resting on the Sabbath [2] or observing dietary laws.[3] It means being able to form or maintain self-governing religious communities—churches, synagogues, parachurch organizations, religious societies—in which individual believers can bind themselves together in pursuit of religious objectives. It means, moreover, that for purposes of internal organization—doctrine, administration, membership criteria, structure—these religious communities must be free from governmental interference.

Three lines of Supreme Court precedent support this right of institutional religious autonomy. First are the church property cases,[4] culminating in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). These cases recognize that the government (including the courts) may not interfere in issues of "church polity and church administration." *Id.* at 710. See also, *e.g.*, *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 107 (1952) (extending First Amendment protection to matters of "church administration" and "the operation of churches"). Second are the "entanglement" cases, such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971). These cases recognize that close government scrutiny of even apparently secular components of a pervasively sectarian institution "is a relationship pregnant with dangers of excessive government direction of . . . churches." *Id.* at 620. The Court's analysis shows particular sensitivity to the entanglement created when the government is called upon "to determine which [activities of a religious institution] are religious and which

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[2] See *e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963).

[3] See, *e.g.*, *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975).

[4] The district court (J.S. App. 52a n.49) found reliance on the property cases 'misplaced," on the ground that "this case does not involve internal church conflicts over religious doctrine, practice or discipline." We submit, however, that there is no more justification for state interference with internal church practice at the behest of a non-member than at the behest of a dissident faction.

are secular." *Id.* at 621-22. Third is *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), in which this Court avoided potential First Amendment problems by construing the National Labor Relations Act not to apply to pervasively religious private schools. Among other problems with the Act, the Court foresaw that Labor Board jurisdiction over parochial schools would "involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 502. Even more fundamentally, the interjection of a secular element—the Union—between the religious hierarchy and the subordinate agents of the church, the teachers, would be inconsistent with the system of "[r]eligious authority [that] necessarily pervades the school system." *Id.* at 501.

In these institutional autonomy cases, two values that often seem to conflict—the values of separation of church and state and of free exercise—are in perfect harmony. Cf. *Thomas v. Review Board*, 450 U.S. 707, 720-27 (1981) (Rehnquist, J., dissenting). Indeed, the constitutional right partakes of both Free Exercise and Establishment Clause elements.[5] The Free Exercise element arises from the right of associations of believers to create self-governing religious communities, through which they can give homage to, and perform the work of, their God on earth. In this sense, church autonomy is a liberty, closely akin to the rights of family and freedom of association. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-619, 622-23 (1984). "Protecting [the religious community] from unwarranted state interfer-

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[5] See Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1378-88, 1392-94 (1981) (locating church autonomy right under Free Exercise Clause; Esbeck, *Establishment Clause Limits on Governmental Interference With Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984) (locating church autonomy right under Establishment Clause); *NLRB v. Catholic Bishop, supra* (referring to church autonomy right under "the First Amendment").

ence . . . safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619.

To focus on church autonomy solely as a matter of personal liberty, however, would neglect the institutional element best seen as arising from the Establishment Clause. The Establishment Clause guarantees a structural relationship of mutual independence between church and state. "The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. at 614. Churches, like the press, like political associations, like colleges and universities, provide islands of thought and value independent of the homogenizing pressures of the state; they create diversity and the possibility of growth and choice in society; they generate a spirit of willing compliance with notions of justice and regard for others. In this sense, church autonomy is closely akin to the structural provisions of the Constitution. The Religion Clauses of the First Amendment can be seen as a jurisdictional provision, like the separation of powers, that creates and preserves the preconditions for a free and pluralistic society.

Two specific aspects of institutional religious autonomy are particularly implicated in this case: the right of religious exclusivity (*i.e.*, the right of a religious community to insist that its corporate actions be carried out by and through its own members) and the right of self-definition (*i.e.*, the right of a religious community to determine, by its own criteria, the nature and extent of its religious mission).

The right of religious exclusivity may seem oppressive to outsiders. Appellees in this case, for example, obviously chafe at the fact that in order to perform roles within the LDS Church structure they must conform to the standards and obligations of the Church. But the right to exclude nonmembers is indispensable to the creation of a self-governing community. As this Court has

stated, "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v. United States Jaycees*, 468 U.S. at 623. While churches typically are open to new members, membership must be on the church's own terms. All who unite with the religious body "do so with an implied consent to this government, and are bound to submit to it." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872). An outsider has no right to share the privileges of membership—including the possibility of employment within the church—while refusing to share the mutual commitments of membership.

The right of religious exclusivity applies no less to a church's agents than to its members. There are many reasons why a religious organization might legitimately prefer to hire only members of its faith, quite apart from any religious duties in the job description. Members of the faith may be more committed to the enterprise. They may serve as moral exemplars. They may communicate the ethos and mores of the church to the outside world. They may have special insight into the spiritual dimensions of the activity. They may help instill the proper spirit or attitude, or enforce the religion's rules or moral standards. They may lead or participate in Bible studies or devotionals in the workplace. They may be objects of the church's charity. They may be the representatives of the church to the world.

Most fundamentally, hiring within the faith reflects the nature of religious authority in the church. As the district court observed (J.S. App. 72a), "Religious authority necessarily pervades all the activities in which a religious organization engages." Religious authority is not reducible to the economic relationship of employer or employee. Cf. *Catholic Bishop*, 440 U.S. at 504 ("The church-teacher relationship in church-operated school differs from the employment relationship in a public or

other nonreligious school.") Churches commonly expect a degree of commitment, in all their operations, that stems from a voluntary submission to a shared understanding of religious norms and objectives. Workers in the church are not wage slaves. The authority of church leadership over the church's operations is not merely a consequence of their power over the paychecks of church employees, but has a spiritual dimension. To force the church to employ outsiders would transform the nature of authority within the religious community from a system of voluntary shared submission to common principles to one of economic command and control.[6]

Contrary to the district court (J.S. App. 54a), the right of religious exclusivity is not limited to instances in which the employment decision is governed by a formal religious "tenet". The right of religious autonomy is a right of independence from government interference, wholly apart from the ability to comply with specific religious doctrine.[7] As this Court explained in *Kedroff*, at stake is "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government *as well as* those of faith and doctrine." 344 U.S. at 116 (em-

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[6] Interference with the right of religious organizations to employ only members of their faith is far more disruptive to religious autonomy than other forms of labor regulation, such as minimum wages, maximum hours, or prohibitions on race or sex discrimination. See *e.g.*, *Tony & Susan Alamo Foundation v. Donovan*, 105 S. Ct. 1953, 1963-64 (1985). These other forms of regulation may also reflect a more compelling governmental interest. See pages 24-27, *infra*. While there are constitutional limitations on these other forms of regulation, this case presents no occasion for defining them.

[7] Indeed, churches must sometimes be constitutionally exempt even from governmental regulations that appear to be in consonance with church doctrine. A church may be conscientiously opposed to racial discrimination, for example, without opening itself to government inquiries about the reasons for hiring, or refusing to hire, its clergy.

phasis added). Every decision made by religious leaders, pursuant to the church's governing structure, is authoritative within the religious community and entitled to respect by the government, absent compelling justification. Many decisions within the church are a matter of prudent judgment rather than interpretation of religious doctrine. A church might, for example, adopt one religious curriculum rather than another, or establish a new program or activity, without anyone believing that the course adopted was compelled by religious dogma. Such decisions are not less protected because not governed by religious doctrine.[8]

The district court (J.S. App. 53a-54a) recognized the Church's constitutional right to restrict hiring to members of its faith, but only for activities the court determined to be "religious." The court examined at length the three church activities at issue in this case to determine, under its own secular criteria, whether they were sufficiently "religious" to warrant constitutional protection. In so doing, the court gravely misconceived the role of the government and the courts in First Amendment controversies, and violated the Church's constitutional right to define and determine for itself the nature of its religious mission.

The concepts of "religious" and "secular" activities are not self-defining. *Cantwell v. Connecticut*, 310 U.S. 296,

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[8] See Laycock, *supra* note 5, at 1390-91 (footnotes omitted):

> Any activity engaged in by a church as a body is an exercise of religion. This is not to say that all such activities are immune from regulation: there may be a sufficiently strong governmental interest to justify the intrusion. But neither are these activities wholly without constitutional protection. It is not dispositive that an activity is not compelled by the official doctrine of a church or the religious conscience of an individual believer. Indeed, many would say that an emphasis on rules and obligations misconceives the essential nature of some religions.

305 (1940);[9] see also *Lemon v. Kurtzman*, 403 U.S. at 621-22; *Thomas v. Review Board*, 450 U.S. at 714. These terms derive their content only from the religious world view of the believers involved in the case. The task of the government in enforcing its regulatory requirements, and derivatively the task of the judiciary in reviewing government action, is not to determine for itself what is "religious" but solely to determine whether the religious entity involved in the case, in good faith, understands the activity in question to be part of its religious mission.

The concept of self-definition is at the core of free exercise jurisprudence. At the time when Fisher Ames first proposed inclusion of the words "free exercise" in the Bill of Rights,[10] twelve of the thirteen states had constitutional provisions guaranteeing freedom of conscience (in many instances using the very language "free exercise" of religion). These provisions made clear that the scope of religious exercise must be determined in accordance with the beliefs of the religious practitioner, and not the outsider's view of what is "religious". The Virginia Declaration of Rights, so influential in the framing of the First Amendment, protected the "free exercise of religion" and defined religion as "the duty which we owe to our Creator, *and the manner of discharging it.*" B. Poore, *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* 1909 (1878) (Va. Bill of Rights of 1776, § 16) (emphasis

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[9] In *Cantwell*, a state statute forbade solicitation except for "religious" causes. This Court commented that the official charged with enforcement of the statute "is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment." 310 U.S. at 305. Similarly, in this case the district court held that a religious organization may not exercise its First Amendment rights unless government officials charged with enforcing Title VII determine that the activity is "religious".

[10] See I *Annals of Congress* 766 [796] (Aug. 20, 1789) (J. Gales, ed. 1834).

supplied). Fisher Ames' native Massachusetts defined the right of "worshipping God in the manner and season most agreeable to the dictate of [one's] own conscience." *Id.* at 957 (Mass. Const. of 1780, Pt. I, Art. II). Pennsylvania's much-imitated Declaration of Rights of 1776 protected the citizens' "natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding." *Id.* at 1541 (Art. II).

Given the absence of any discussion of the meaning of "free exercise" in the debates over the First Amendment, it is reasonable to suppose that the framers intended, and the ratifiers understood, the term to carry the meaning that had become familiar in the various state provisions: a definition of free exercise based on the believer's own understanding of religious observances. This is borne out by this Court's free exercise cases, in which the emphasis is placed on whether the believer's assertions of religious conviction are sincere and in good faith —not whether they conform to secular notions of what is "religious." See *United States v. Ballard*, 322 U.S. 78 (1944); *United States v. Seeger*, 380 U.S. 163, 184 (1965). As the Court stated in *Thomas v. Review Board*, 450 U.S. at 714, resolution of what is a "religious" practice "is not to turn upon a judicial perception of the particular belief or practice in question."

As in *Thomas*, one can imagine in this context "an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.* at 715. But it seems to us that the LDS Church's assertions of religious motivation for the conduct of Deseret Gymnasium, Beehive Clothing Mills, and Deseret Industries are sufficiently plausible that, in the absence of proof of bad fatih, the court should have deferred to its claim for constitutional protection.

The district court's approach to determining whether activites of the Church are "religious" disregarded en-

tirely the good faith judgment of the Church, and substituted an examination of secular criteria. The court's approach was contrary to constitutional principles in four respects.

First, the district court confined "religious" activities to those directly related to "spread[ing] or teach[ing] the religious beliefs and doctrine and practices of sacred ritual" of the church (J.S. App. 13a). See also J.S. App. 71a ("[t]he primary purpose of religious organizations, obviously is to carry on religious rituals, teach religious doctrine and proselytize"). This is an exceedingly narrow understanding of the life of a religious community. In addition to doctrinal teaching and the practice of rituals, churches engage in many other activities, including fellowship, social or community service, mutual care and assistance, charity, and outreach. To the outsider, some of these activities may appear to be "secular": is a church supper any different from a secular social event? To the religious community, however, these activities form an integral part of the life together. To teach as "religious" only the doctrinal and ritual aspects of church life is to reduce religious life to a formalism.

Second, the district court used explicitly secular standards to judge the "religious" quality of church activities. Deseret Gymnasium is not "religious", according to the court, because "[i]t offers the same facilities and services that are available in other gymnasiums" (J.S. App. 15a). Although Deseret Gymnasium enforces the LDS Church's doctrinal prohibition on smoking, this is not "religious", according to the court, because the "no smoking rule is as consistent with the beliefs and practices of athletics as it is with the beliefs of the Mormon Church" (*ibid.*). This is pure secular reductionism. A religious activity does not become "nonreligious" merely because some outsiders may perform similar actions for secular reasons. Unbelievers sometimes feed the hungry and care for the sick. This does not make religiously motivated acts of charity any less "religious." Nor do religious standards

of conduct become "nonreligious" merely because they happen to coincide with secular beliefs. See *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments are "religious in nature", notwithstanding their incorporation in the fundamental legal codes of Western nations).[11] If the motivation for maintaining the gymnasium is religious, and if its standards of operation are religious, it is constitutionally irrelevant that secular gymnasiums may appear superficially similar.

Third, the district court refused to grant constitutional protection to sincere religious beliefs unless those beliefs satisfied the court's notion of consistency. In *Thomas v. Review Board*, 450 U.S. at 714, this Court held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Nonetheless, in connection with Beehive Clothing Mills the district court ordered extensive discovery into the present and past practices of the LDS Church in order to resolve appellee's attack on the "consistence of [appellants'] asserted belief that only eligible members can manufacture temple wear" (J.S. App. 103a). The Court ordered discovery into the reasons for each instance in which the Church had hired individuals who did not observe the standards of the Church (*ibid.*), and into the reasons why the church has not maintained its exclusive hiring standards for the production of temple garments abroad (*id.* at 104a). Neither of these issues is properly within the province of a secular court. Courts are required to accept as authoritative the statements of church authorities about issues of church doctrine. *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440, 449

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[11] Nor is it significant that the Deseret Gymnasium is "open to the public" (J.S. App. 14a). St. Peter's Cathedral in Rome is open to the public, but it is not therefore the constitutional equivalent of the Uffizi. "[A] religious activity of a religious organization does not lose that special status merely because it holds some interest for persons not members of the faith." *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974, 978 (D. Mass. 1983).

(1969). That a secular court may review church doctrine as illogical or inconsistent, or be unpersuaded by the church's reasons for applying the doctrine differently in different worldly circumstances, is not a valid basis for rejecting its sincerity or authority.

Fourth, the district court confined "religious" activities to those compelled by religious doctrine. Deseret Gymnasium is not "religious," according to the court, because "there is no evidence that it is a fundamental tenet of the Mormon Church that its members must engage in physical exercise and activity and must do so in a gymnasium owned and operated by the Mormon Church and in which all employees are practicing members of the Mormon Church" (J.S. App. 15a). Churches engage in many activities that are not compelled by religious doctrine. Nothing in Christian doctrine requires the church to establish a choir, for example, or a youth group softball league. Does this mean that outsiders must be hired to sing soprano, or supervise the youth group?

In a particularly egregious example of securalistic misunderstanding, the district court conceded that Deseret Gymnasium may be "charitable," but held that "there has been no claim or showing that the charitable services are intimately connected to religious beliefs or tenets of the Mormon Church" (J.S. App. 16a n.17). It is not surprising that the connection between faith and good works, which has perplexed many a theological mind, should seem elusive to a secular court. But it is surprising that a court would presume to hold, on the basis of its study of religious doctrine, that the charitable activities of a church are unrelated to its religious function.[12]

Appellants were denied the opportunity to present their full case on the religious nature of Deseret Gymnasium (J.S. App. 18a n.18) and it is therefore necessary for

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[12] The attempt to distinguish between charitable and religious activities was one of the constitutional flaws in the ordinance invalidated in *Rusk v. Espinosa*, 634 F.2d 477 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982).

an appellant court to view the evidence in the light most favorable to their position. The evidence shows that the LDS Church has consistently maintained a distinction between its commercial enterprises, which are conducted through taxpaying corporate entities not covered by the 702 exemption, and church activities, which are conducted directly by the Church itself. See affidavit of Wayne Nelson, ¶ 6; affidavit of J. Richard Clarke. The evidence shows that the Deseret Gymnasium is heavily subsidized by the Church and has no separate corporate or financial existence from the Church. Affidavit of Leon Heaps, ¶¶ 4-5. It is governed by a board that serves at the pleasure of the First Presidency of the Church. *Id.*, paragraph 3. The gymnasium has been held exempt from real estate taxation on the ground that it is used "exclusively for religious and charitable purposes." Affidavit of Leon F. Olsen, ¶ 5. The evidence shows that those who constructed the gymnasium did so in the hope of expectation that "whatever is done by way of exercise, physical contest in games, or whatever it may be in the training and recreation of those who patronize this gymnasium will be done in the spirit of prayer and obedience to [God's] commandments." Prayer of Dedication, Deseret Gymnasium. The evidence shows that the church authorities enforce religious standards of conduct within the gymnasium,[13] and that, as part of the Church's "charitable efforts," they make the gymnasium available at no cost or reduced cost to various religious and community service groups, to LDS missionaries, and to Church leaders. Affidavit of Leon Heaps, ¶ 6.

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[13] The district court acknowledged (J.S. App. 72a) that "[t]he purpose of Deseret is to provide facilities for physical exercise in an atmosphere reflecting the standards of the Mormon Church." This purpose, however, the court inexplicably described as "secular" (*ibid.*). The court also acknowledged that "the religious beliefs of the Mormon Church can be furthered through Deseret" (*ibid.*). It is not clear why the court did not consider this sufficient reason to hold the Church's employment practices in the gymnasium constitutionally protected.

The Deseret Gymnasium seems indistinguishable from countless facilities for wholesome recreation maintained by churches all over the country. The provision of such facilities has been a major outreach effort by churches and such parachurch organizations as the Young Mens Christian Association since at least the turn of the century. It is commonly thought that by providing low-cost opportunities for youths to engage in vigorous physical exercise in a wholesome environment, such gymnasiums contribute to the moral health of the community. There is no more reason to label this sort of facility "non-religious" than many of the other community service and outreach ministries of American churches.

We believe, therefore, that under correct constitutional standards the district court should have concluded that the Deseret Gymnasium is understood, in good faith, by the LDS Church as part of its religious mission.[14] Accordingly, the Church has a First Amendment right to hire only members of its faith to carry on the activity. Under the facts of this case, therefore, there is no inconsistency whatsoever between constitutional requirements and the statutory exemption.

B. The Statutory Exemption Protects the Constitutional Rights of Churches and Eliminates the Need for Entangling Case-by-Case Inquiries Into the Scope of a Church's Religious Mission

The 702 exemption, as amended in 1972, carries out Congress' intention not to disturb the constitutional right of churches to hire only members of their own faith for all of their undertakings. Indeed, allowing space for churches to so decide, or not so decide, illustrates that there will be ecclesiastical diversity of polity and practice. We do not contend that the full sweep of this exemp-

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[14] We will not discuss the evidence bearing on Deseret Industries or Beehive Clothing Mills. The district court concluded that Deseret Industries was "religious" (J.S. App. 105a-116a) and ordered additional factfinding concerning Beehive Clothing Mills (J.S. App. 101a-105a).

tion is required in all circumstances by the First Amendment. There may be activities conducted by churches that, under their own self-definition, are so unrelated to their religious mission that religious antidiscrimination regulation would be constitutionally permissible. Nonetheless, we believe that the full 702 exemption is constitutionally justified because it eliminates the need for the government's enforcement bureaucracies and the courts to determine which of a church's activities are sincerely considered "religious." The exemption thus eliminates a source of entanglement and friction between church and state.

There can be no doubt that Congress has the authority to exempt religious organizations from regulation, even where not required to do so under the First Amendment. As this Court stated in *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970), "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." Accord, *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting). In *NLRB v. Catholic Bishop*, *supra*, the Court interpreted the NLRA as creating a specific exemption solely for religious organizations, in order to avoid the serious constitutional question that would have been raised if religious organizations were subjected to NLRB jurisdiction. And in *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780-81 (1981), the Court interpreted the federal unemployment tax act as exempting church schools, partly to avoid doubts about the constitutionality of the contrary construction. It is evident that exempting religious organizations from government regulation is an accepted means for avoiding constitutional conflicts. In none of these cases has the Court suggested that such exemptions are likely to violate the Establishment Clause.

The district court held that exempting churches from the religious antidiscrimination regulations of Title VII

violates the Establishment Clause, insofar as the exemption goes beyond that required under the Free Exercise Clause. The court found the 702 exemption unconstitutional because it is not "facially neutral," but applies only to religious organizations (J.S. App. 66a), and because the exemption would allow religious organizations to "engage in conduct which can directly and immediately advance religious tenets and practices (J.S. App. 70a). This, according to the court (J.S. App. 69a), constitutes "the sponsorship of religion by government."

The district court has mistaken separation for sponsorship. The 702 exemption, like many other statutes and ordinances,[15] exempts religious organizations from a form of government regulation that, in the legislative view, is not sufficiently compelling to justify the intrusion into church autonomy. Churches are "singled out" for such exemptions, not for purposes of government "sponsorship," but because the tradition of separation of church and state teaches that the government and religious institutions should remain, insofar as possible, at arms length. For precisely the same reason that churches are made ineligible for government benefits that might entail excessive entanglement (*e.g.*, *Lemon v. Kurtzman*, *supra*), churches are also exempted from many forms of government regulation. This is simply the consequence of institutional separation between government and religion. Sometimes separation helps churches; sometimes separation hurts churches; but in neither case can the

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[15] In addition to the exemptions at issue in *Catholic Bishop* and *St. Martin Evangelical Lutheran Church*, see 15 U.S.C. § 77c(a)(4) (churches exempt from disclosure and registration requirements of federal securities laws); 26 U.S.C. § 6033(a)(2)(A) (religious organizations exempted from filing of information returns); Opin. Letter of Employment Standards Administrators, No. 1240, Labor L. Rep. (CCH) paragraph 30,826 (Dec. 27, 1972) (certain religious employees exempted from federal minimum wage and maximum hour laws); Note, *Religion-Based Antitrust Exemptions: A Religious Motivation Test*, 57 Notre Dame Law, 828 (1982).

"special treatment" of religion be considered "sponsorship."

Nor is it plausible to view exemptions such as Section 702 as "advancing" religion. See J.S. App. 70a. When instituting a regulatory regime like Title VII, Congress must decide whether or not to apply it to religious organizations. In making the decision, Congress has some latitude. If Congress applies the new regulations to religious organizations, it may have the incidental effect of "inhibiting" religion. If it exempts religious organizations, this has the effect of leaving religion in the same position it was in before. While this might be considered "advancing" religion relative to regulated entities, it should more properly be viewed as leaving religion untouched. Whether religion is "advanced" by an exemption must be viewed against the baseline of government inaction, not on the assumption of government regulation.[16]

This Court has recognized that one permissible purpose for legislative judgments in this area is to eliminate the need for intrusive case-by-case inquiries into issues of religious sincerity. In *Bob Jones University v. United States*, 461 U.S. 574, 604 n.30 (1983), for example, the Court noted that "[t]he uniform application of the [prohibition on race discrimination] to all religiously operated [activities] *avoids* the necessity for a potentially entangling inquiry." In *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977), the Court stated that "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will only happen once." In *NLRB v. Catholic Bishop*, 440

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[16] The district court analyzed the 702 exemption as if it augmented the powers of religious organizations. See J.S. App. 73a ("[u]nder section 702, the government has given religious organizations the authorization to exercise that type of coercive power"). In fact, under Section 702, the government leaves religious organizations in precisely the same position they had been for 200 years. To leave the church alone is not the same as giving it a benefit.

U.S. at 502, the Court sought to avoid the necessity of inquiries into "the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission," The Court pointed out that "[i]t is not only the conclusion that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Ibid.* See also *Rusk v. Espinosa*, 456 U.S. 951 (1982), *aff'g* 634 F.2d 477 (10th Cir. 1980).

Avoiding such a "process of inquiry" is a constitutionally valid reason for extending a religious accommodation beyond the minimum necessary under the Free Exercise Clause. While such inquiries may be unavoidable in free exercise cases, when the legislature seeks to apply its regulations to the maximum extent permissible under the Constitution, they should be avoided whenever possible.

The congressional determination to exempt all activities of religious organizations from the religious antidiscrimination requirements of Title VII was a reasonable judgment to avoid potentially divisive entanglement. As the district court noted (J.S. App. 74a-75a) "this exemption was designed to minimize involvement and entanglement between church and state and to ensure that the government and courts do not go through the rigors of inspecting and analyzing whether the activities in which a religious entity is engaging are religious or secular, thus avoiding an intimate and continuing relationship between church and state."

As we read the language of Section 702, the exemption does not apply to all church-owned enterprises, but only to enterprises that are either themselves a religious institution or are operated directly by a religious institution. By its terms, the exemption applies only to a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1. A separately-incorporated business owned by a religious organization should

not be deemed a "religious corporation" for purposes of this statute. If a church purchased the stock of a chain of drugstores and operated the business as a separate corporation, the 702 exemption would not apply. The employer—the drugstore corporation—would be a commercial, and not a religious, corporation. The identity of the stockholder does not effect the character of the corporation. Only if the drugstores were operated directly by the church without a separate corporate identity would the 702 exemption apply.[17]

Accordingly, the issue in this case is the propriety of Congress's decision not to require an investigation into whether the activities *of the church itself* are "religious" or "secular." Because the only activities affected by the 702 exemption are those of the church itself, any such investigation would necessarily intrude into the ecclesiastical affairs of the employer. It could not be confined to the marginal, putatively "secular," aspects of church affairs.[18] Enforcement of Title VII, under the district court's ruling, would require churches to disgorge extensive information about their organizational structure, finances, and purposes. Cf. *Larson v. Valente*, 456 U.S. 228, 253 n.29 (1982) (the ordinance "calls for the provision of a substantial amount of information, much of which penetrate deeply into the internal affairs of the registering organization"); *Rusk v. Espinosa*, *supra* (same).

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[17] The LDS Church, for example, owns 100 per cent of the stock in a number of profit-making corporations. These business corporations are not subject to the 702 exemption. They do not discriminate with respect to religion in their employment decisions, and would not be permitted under the law to do so.

[18] See *Legislative History of the Equal Employment Opportunity Act of 1972* 1211-12 (statement of Sen. Ervin):

> As Supreme Court Justice Douglas so well declared in one of the school prayer cases, it is impossible to separate the religious and non-religious activities of a religious corporation. . . . This is so because the whole religious organization is one body and yet the bill would attempt to divorce the two kinds of activities each from the other.

The district court's approach depends on the proposition that it is a relatively simple matter to distinguish the "religious" from the "secular" activities of religious organizations. See also *King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). Unfortunately, drawing such distinctions is far from simple, especially with regard to so sensitive an issue as religious criteria for hiring. At one end of the spectrum there are relatively straightforward cases: even the district court had no trouble in finding the ritual and doctrinal teaching functions of the church "religious". Slightly more ambiguous are the social and charitable activities of the church, which may resemble activities of secular organizations. Deseret Gymnasium is an example. Under proper constitutional principles, these activities should be deemed "religious" without need for extensive investigation. See *Tony & Susan Alamo Foundation v. Donovan*, 105 S. Ct. 1953, 1962 & n.25 (1985). To distinguish between the "religious" and the social or charitable activities of the church would intrude deeply into issues of theological self-understanding.

There is stronger basis for government regulation of profit-making activities of the church.[19] But even here, difficult religious issues often lurk beneath the surface, and Congress was justified in deciding that the entanglement is better avoided. Some "businesses" may be conducted by churches for specifically religious reasons. Examples include religious publishing,[20] religious broadcasting,[21] or the production of religious objects. Beehive

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[19] See *Tony & Susan Alamo Foundation v. Donovan, supra;* see also 26 U.S.C. §§ 511-513 (taxation of "unrelated business income" of religious organizations).

[20] *E.g., Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983).

[21] *E.g., King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). *King's Garden* is an ironic example. The FCC's jurisdiction over King's Garden's hiring practices was based solely on the fact that "employment practices have an ob-

Clothing Mills is an instance of the latter.[22] Some businesses may be conducted by churches in order to provide employment for the needy or the handicapped, or for members of their own faith who may be out of work. Deseret Industries is an example of this. See J.S. App. 105a-116a. Some businesses may be conducted in an intensely religious atmosphere. Traditional monastic communities frequently engage in production of various items for sale to the public; yet it has never been suggested that the monks must open their ranks to outsiders. Some businesses may be conducted by religious communities in order to maintain their separation from the outside world. See *United States v. Lee*, 455 U.S. 252 (1982) (Amish employer of Amish workers). Even among otherwise nonreligious church-owned businesses, the religious beliefs and moral standards of the church may cause the business to be conducted somewhat differently than a comparable secular business. As the district court noted (J.S. App. 73a), "religious authorities in charge of the activities of the religious organization would find it difficult to totally separate their religious beliefs from their ideas regarding valid business practices."

Essential to the religious element in any of these enterprises is the right to confine employment to members of the church's own faith. To deny the religious employer the right to hire only its members in such enterprises is tantamount to denying it the right to carry on such enterprises for religious ends. Thus, even among apparently commercial businesses, it would be necessary, in the absence of the 702 exemption, to inquire deeply into the relation between the activity and the religious mission of the church that owns that business. One need

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vious, if indirect, impact on programming." *Id.* at 53 n.4. But the court rejected the broadcaster's free exercise claim on the ground that the employment in question could have no effect on its "espousal" of religious views, *i.e.*, on its programming. *Id.* at 60-61.

[22] Beehive Clothing Mills does not, however, make a profit. Rather, it is subsidized by the Church. J. S. App. 98a-99a.

look no further than the record in this case to see how intrusive such an inquiry can be.[23]

Whether this form of investigation is necessary is a question of legislative judgment, in the first instance. At a certain point, the inquiry may become so intrusive that an exemption becomes constitutionally compelled on that basis alone. The district court's inquiry here approaches that point, if it has not exceeded it. But it is not necessary in this case to determine the constitutional limits on judicial investigation into the "religious" nature of church activities. Here, Congress had expressly determined that its policy of religious nondiscrimination is not sufficiently weighty to justify this degree of intrusion into the autonomy of religious organizations. That determination should be respected.

Congress has reached a different balance in other contexts, where its interest is more compelling, or where the investigation of church affairs is less sensitive than it is when religious hiring requirements are at issue. For example, Congress has created no exception on behalf of religious organizations from Title VII's prohibitions on race and sex discrimination in employment. It is therefore unavoidable in that context for courts to determine which activities of religious organizations are sufficiently "religious" that they are constitutionally exempt. See, *e.g.*, *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982). This district court was wrong, however, to treat those cases as precedent supporting the legitimacy of such inquiries where Congress has deliberately chosen not to push its regulatory jurisdiction to the constitutional limit. See J.S. App. 45a-

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[23] The interrogatories in this case should be compared to the inquiries made concerning the religious content of the activity in *Catholic Bishop*, 440 U.S. at 507-08 (appendix to the Opinion of the Court), which this court cited as an example of the "sensitivity" of "[t]his kind of inquiry." *Id.* at 502 n.10.

48A. Obviously, Congress has judged that its interest in preventing religious discrimination by religious organizations is less compelling than its interest in preventing race and sex discrimination.

Where Congress has deliberately avoided the need for potentially entanging investigations into the internal religious affairs of religious organizations, the Establishment Clause is not thereby offended. On the contrary, the effect is to allow religious organizations to conduct their affairs without governmental intrusion, and to allow courts and government officials to abstain from sensitive judgments of a religious nature. The congressional judgment to exempt religious organizations from the religious antidiscrimination regulations of Title VII is fully harmonious with the religious freedom provisions of the First Amendment.

CONCLUSION

The judgment of the district court should be reversed.

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January 5, 1987

(10) (9)

No. 86-179 and 86-401

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, and THE UNITED STATES OF AMERICA,
Appellants,

vs.

CHRISTINE J. AMOS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Did the court below err in holding that the First Amendment prohibits Congress from permitting religious organizations to discriminate on the basis of religion in hiring individuals to perform work connected with activities that a secular authority might consider "non-religious"?

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No. 86-179 and 86-401

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October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, and THE UNITED STATES OF AMERICA,

Appellants,

vs.

CHRISTINE J. AMOS, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

Pursuant to Rule 36.2 of the Rules of this Court, the organization named above files this brief in support of

Appellants. Consent for the filing of this brief has been obtained in writing from the attorneys of record for the parties in this case. Their original letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These constituent bodies

have a total membership of approximately 30 million and reflect the traditional Baptist concern for proper church-state relations. As part of their religious mission, these bodies operate and maintain colleges, universities, seminaries, and other agencies that will be affected by the Court's decision in this case.

The Baptist Joint Committee on Public Affairs has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ."

Among Baptists, religious liberty is a fundamental and sacred principle. Baptists are deeply committed to the principle of non-establishment, or church-state separation, as the institutional guarantor of this liberty. The Baptist commitment to non-establishment was evidenced by their enthusiastic

support for both the Virginia Act for Establishing Religious Freedom and the First Amendment. See A. Stokes and L. Pfeffer, Church and State in the United States 62-63, 203-204 (1964). Indeed, it is not overstatement to suggest that without the efforts of Baptists there would be no provision for church-state separation in the Constitution. See J. Dawson, Baptists and the American Republic 117 (1956).

Because of its commitment to religious freedom for all citizens, the Baptist Joint Committee throughout the years has opposed governmental efforts to breach the wall of separation between church and state by aiding or advancing the cause of religion. At the same time the Committee has been zealous in its defense of church autonomy and the free exercise of religion.

The Baptist Joint Committee believes

that the principle of religious liberty as embodied in the First Amendment to the Constitution of the United States has been seriously damaged by the decision of the United States District Court for the District of Utah. The court has misinterpreted the establishment clause so as to jeopardize the autonomy of religious organizations and the healthy separation of church and state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I, provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a), provides that it shall be unlawful for an employer:

> (1)to fail or refuse to hire or to discharge any individual, or other-

wise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 702 of the Civil Rights Act of 1964 (unamended), formerly codified at 42 U.S.C. §2000e-1, provided:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its religious activities.

The 1972 amendment to Section 702, codified at 42 U.S.C. §2000e-1, provides:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any state, or to a religious corporation, association, educational institution, or society with respect to the employ-

> ment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

SUMMARY OF ARGUMENT

During the Senate debate over the 1972 amendment to §702 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, one of the amendment's sponsors, Senator Ervin, cited Justice William O. Douglas, stating:

> It is impossible to separate the religious and non-religious aspects of a religious corporation. 118 Cong.Rec. 1973 (Feb. 1, 1972).

Heeding the admonition of Senator Ervin, Congress deleted the portion of §702 that had assigned to government the impossible task referred to by Justice Douglas. The sole purpose for Congress' action was to disentangle government from the internal affairs of religious

organizations. 118 Cong.Rec. 946-949, 4503 (1972).

The primary effect of §702 as amended is not the advancement of religion but rather the strengthening of the wall of separation between church and state. Similarly, the amendment serves to prevent excessive government entanglement with religion.

Congress' action in amending Title VII is in complete harmony with this Court's interpretations of the religion clauses of the First Amendment. Therefore, the judgment of the District Court should be reversed.

ARGUMENT

The court below erred in holding that the First Amendment prohibits Congress from permitting religious organizations to discriminate on the basis of religion

in hiring individuals to perform work connected with activities that a secular authority might consider "non-religious." While the lower court properly identified the tripartite test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971),[1] as the appropriate criterion for evaluating this case, the court's application of the test was erroneous.

A. SECULAR PURPOSE.

As originally adopted, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, exempted religious organizations from its prohibitions against religious discrimination in employment with respect to the organization's "religious

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[1]The Court held in Lemon, supra, at 612-613, that in order to pass muster under the establishment clause, a statute (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive entanglement between government and religion.

activities." Congress amended the Act in 1972 by striking the word "religious," thereby broadening the exemption to cover activities that a secular authority might consider "non-religious."

The legislative history of the 1972 amendment clearly demonstrates that a legitimate secular purpose existed for its adoption. That secular purpose was to avoid governmental interference and entanglement with religion. 118 Cong. Rec. 946-949, 4503 (1972).

The original Act had put the government in the untenable position of examining and evaluating the beliefs and practices of religious organizations for the purpose of determining which of their activities were "religious." It took Congress eight years to recognize that government was wholly incompetent to make such determinations and that any attempt to define the church's religious mission

was constitutionally problematic. The 1972 amendment resolved this problem by deferring to the religious organizations themselves to define the nature and scope of their religious mission.

The District Court recognized the secular purpose for the 1972 amendment stating, "The legislative goal of assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions is a valid secular purpose. Furthermore, there is no indication that Congress amended §702 for a religious purpose or to promote religion or religious beliefs." Amos v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 594 F.Supp. 791, 812 (D.Utah 1984) [hereinafter cited as Amos I].

B. PRIMARY EFFECT.

The District Court held that "the direct and immediate effect of the exemption of religious organizations from Title VII for religious discrimination in secular, non-religious activities is to advance religion in violation of the establishment clause of the first amendment to the United States Constitution." Amos I, supra, at 828.

The District Court is mistaken.

The establishment clause was adopted to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668 (1970). This great clause secures the separation of church and state which is the institutional guarantor of our religious liberty.

On the basis of the establishment clause, the Court has struck down

numerous attempts by government to breach the wall of separation by aiding or advancing the cause of religion. E.g., Grand Rapids School District v. Ball, _____ U.S. _____, 105 S.Ct. 3216 (1985); Wallace v. Jaffree, _____ U.S. _____, 105 S.Ct. 2479 (1985); Stone v. Graham, 449 U.S. 39 (1980). Notwithstanding, it is well established that not every law that confers an "indirect," "incidental," or "remote" benefit upon religion is unconstitutional. Committee for Public Education v. Nyquist, 413 U.S. 756, 771 (1973), citing Everson v. Board of Education, 330 U.S. 1 (1947); McGowan v. Maryland, 366 U.S. 420, 450 (1961); Walz, supra, at 671-672, 674-675; see also Witters v. Washington Department of Services for the Blind, _____ U.S. _____, 106 S.Ct. 748 (1986). In order to violate the establishment clause, an otherwise valid law must have the "primary effect"

of advancing or inhibiting religion. Lemon, supra, at 612.

In keeping with these principles, the Court has upheld numerous laws that confer indirect or incidental benefits upon religion. Witters, supra; Everson, supra; Board of Education v. Allen, 392 U.S. 236 (1968). More importantly, the Court has upheld statutory exemptions for religious organizations from otherwise neutral legislative acts. Property tax exemption for churches, Walz, supra, and exemptions from military service for those who object to war for religious reasons, Gillette v. U.S., 401 U.S. 437 (1971) are notable examples. The Court has indicated that other statutory exemptions expressly for religion would be permissible though not required under the First Amendment.[2] Braunfeld v. Brown,

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[2]The Court has made clear that "the limits of permissible state accommodation to religion are

366 U.S. 599, 608 (1961). At times the Court has even created its own exemption when none was expressly provided in the statute. NLRB v. Catholic Bishop, 440 U.S. 490 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972). Finally, lower federal courts have upheld similar exemptions for religious organizations.[3] See Tennessee Baptist Children's Home, Inc. v. U.S., 790 F.2d 534 (6th Cir. 1986) and Lutheran

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by no means co-extensive with the noninterference mandated by the Free Exercise Clause." Walz, supra, at 673. Thus, Congress can make certain accommodations for religion that may not be required by the First Amendment. To the extent that Congress so acts, it provides breathing space for permissible religious exercise.

[3]Appellees cite numerous cases in note 9, p. 14 of their Motion to Affirm in support of their argument that labor laws may be applied to religious employers in some instances without violating the free exercise clause. While taking issue with portions of that argument, amicus reminds the Court that the question of whether such laws can be applied to religious organizations without violating the Constitution is not before the Court in this case. The sole issue is whether Congress can exempt religious employers from coverage under §702 of the Civil Rights Act of 1964 without violating the establishment clause.

Social Services of Minnesota v. U.S., 758 F.2d 1283 (8th Cir. 1985) (applying the statutory exemption found in 26 U.S.C. §6033 for churches and their integrated auxiliaries that excuses them from filing informational tax returns).

In like fashion, a majority of states and local governments by statute or judicial decision exempt churches from prohibitions against building in neighborhoods zoned "residential." Comment, "Justice Douglas' Sanctuary: May Churches Be Excluded from Suburban Residential Areas?" 45 Ohio St. L.J. 1018 (1984). Although some courts have held that a municipality is not required to provide such an exemption by the free exercise clause, Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir.), cert. denied, ____ U.S. ____, 104 S.Ct. 72 (1983); Grosz v. City of Miami, 721 F.2d 729 (11th Cir. 1983),

amicus is aware of no decision striking down such an exemption as violative of the establishment clause.

The various exemptions cited above reveal a correct understanding on the part of many governmental agents of the proper relationship between church and state. These governmental agents have recognized that while the separation of church and state protects against governmentally established religion, it prohibits governmental interference with religion as well. Walz, supra, at 669. Exemptions that prevent governmental intrusion into religion, excessive entanglement between church and state, and conflicts with legitimate free exercise not only are consistent with these principles of non-establishment, they are essential to the institutional separation of church and state.

Some of the statutory exemptions for

religion undoubtedly confer an indirect or incidental benefit upon religion. The benefit may vary from being quite significant as in Walz to being relatively minor as in the case sub judice. However, any such benefit manifests no more than the occasional tension between the religion clauses. Thomas v. Review Board, 450 U.S. 707, 719 (1981).

Viewing the application of §702 to religious groups as a whole and not solely to the facts in this case (see Witters, supra), the exemption for religious employers does not have the primary effect of advancing religion.[4]

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[4]Citing Tony and Susan Alamo Foundation v. Secretary of Labor, _____ U.S. _____, 105 S.Ct. 1953 (1985), Appellees argue that the primary effect of §702 is to advance religion because the Mormon church is using the exemption to coerce financial support from its employees, thus giving it an unfair economic advantage over its competitors.

It is tenuous at best to assert that requiring employees to tithe, one small portion of the requirements for a temple recommend, unfairly disadvantages secular employers. First,

To the contrary, one must strain the analysis to discover any benefit at all to religion. No public support, whether financial or otherwise, has been received. No sponsorship or promotion of religion has occurred. No governmental assistance of any kind has been rendered. Congress simply has refused to force religious organizations to hire individuals who do not subscribe to their particular religious viewpoints. Such a decision on the part of Congress is not only lawful, it is laudable.[5] By eliminating

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the tithe goes to the church itself and not to a specific church agency, General Handbook of Instructions, §6, p. 1; and second, even if the tithe went directly to the agency, there is no proof that the majority of these employees would not be tithing anyway apart from the requirements of their employment contracts. In short, no nexus exists between the exemption contained in §702 and the Appellees' allegations of unfair business competition.

[5]The original Act chilled the free exercise of religion by pressuring religious organizations to hire atheists, agnostics or adherents of other faiths who were otherwise qualified for all positions that a court might conceivably consider

governmental interference in religious affairs, Congress has strengthened rather than weakened separation of church and state. The primary effect of such action no more advances religion than do this Court's decisions to refrain from extending its jurisdiction over ecclesiastical matters.

The Court has held repeatedly that the state is prohibited from examining or evaluating matters pertaining to church doctrine and administration. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. 666 (13 Wall. 679) (1871).

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non-religious. Religious employers felt compelled to hire these individuals in order to avoid possible damage awards for religious discrimination.

Congress' action in amending §702 follows the principles set forth in these decisions and should withstand constitutional attack.

In finding the 1972 amendment unconstitutional, the District Court relied heavily on the fact that it was not "facially neutral." Amos I, supra, at 822-824. The court is mistaken in its excessive reliance upon the absence of facial neutrality.

Under an analysis focused upon "primary effect," facial neutrality is not controlling. Neutral statutory language is but one factor to consider in determing whether the primary effect of a statute is to advance or inhibit religion. The fact that neutrality between religious interests and non-religious interests is not mandated by the establishment clause is evidenced by numerous decisions of this and other courts. Yoder, supra;

Gillette, supra; Braunfeld, supra; McGowan v. Maryland, 366 U.S. 420 (1961); Tennessee Baptist Children's Home, supra; and Lutheran Social Services, supra.

The District Court attempts to distinguish this case from those permitting a reasonable accommodation of religion on the grounds that, unlike those cases, "the abolition of the governmental exclusion for religious organizations' religious discrimination in secular, non-religious activities does not present any conflict with the free exercise clause." Amos I, supra, at 824.

The court is flatly wrong.

Any attempt by government to examine and evaluate the doctrines and practices of religious organizations for the purpose of determining which activities are "non-religious" is fraught with both establishment and free exercise problems. As proof, one need look no

further than the test fashioned by the District Court itself to make these determinations.[6] Parts two and three of

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[6]The following test was proposed by the District Court for determining which of a religious organization's activities were "non-religious" and, therefore, subject to Title VII's prohibitions against religious discrimination in employment:

> First, the court must look at the tie between the religious organization and the activity at issue with regard to areas such as financial affairs, day-to-day operations and management. Second, whether or not there is a close and substantial tie between the two, the court next must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial connection between the activity in question and the religious organization's religious tenets or matters of church administration and the tie under the first part of the test is close, the court does not need to proceed any further and may declare the activity religious. See Feldstein v. Christian Science Monitor, 555 F.Supp. 974 (D.Mass. 1983). However, where the tie between the religious entity and activity in question is either close or remote under the first prong of the test and the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent, the court must engage in a third inquiry. It must consider the relationship between the nature of the job the employee is

the court's test require an analysis of church doctrine and practice in blatant violation of the principles of church autonomy set forth in Watson v. Jones, supra, and other decisions of this Court. See Amos I, supra, at 800-802. The test entangles the state in religious matters on a potentially ongoing basis and burdens the free exercise of religion by pressuring religious employers to hire non-religious employees for any position that might conceivably be considered "non-religious". See footnote 5, supra.

While this Court might not be prepared to find that the 1972 amendment was

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performing and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial relationship between the employee's job and church administration or the religious organization's rituals or tenets, the court must find that the activity in question is religious. If the relationship is not substantial, the activity is not religious. Amos I, supra, at 799 (footnote omitted).

required by the First Amendment, the District Court's assertion that the unamended version of §702 presents no conflict with the free exercise clause and is therefore distinguishable from Walz and its progeny is remarkable.

C. EXCESSIVE ENTANGLEMENT.

In order to determine whether a law results in excessive government entanglement with religion, a court must "examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Lemon, supra, at 615.

Applying these criteria to §702, it is obvious that the exemption for religious employers does not foster excessive entanglement. While the character and purpose of many of the exempt organiza-

tions are pervasively sectarian, the nature of the aid provided is that there is no aid. Congress merely has adopted a hands-off policy that allows religious organizations to discriminate on the basis of religion in their employment practices. This refusal to regulate the internal affairs of religious organizations could hardly be viewed as "aid." Similarly, there is no relationship between the government and religious authorities as a result of the 1972 amendment. Far from creating excessive entanglement, the 1972 amendment resolved the entanglement problems that had existed under the original Act. See page 10, supra.

In contrast to the entanglement problems it sees in §702 as amended, the District Court asserts that a limited exemption for "religious" activities only does not create the type of entanglement

the First Amendment seeks to prevent. Amos I, supra, at 814. Although the limited exemption preferred by the District Court does not involve precisely the same type of inspection or evaluation struck down in Lemon, the resulting entanglement is essentially the same. Any attempt to regulate the hiring practices of religious organizations in "non-religious" areas necessitates periodic and detailed evaluation of religious beliefs and practices. Church doctrine must be examined, activities inspected, and theology analyzed in the effort to isolate the "non-religious" activities of the church. The court by its own admission acknowledges this fact: "[The] definite end or purpose [of an activity] must be measured against the religious rituals or tenets of the organization or against matters of church administration." Amos v. Bishop, 618

F.Supp. 1013, 1024 (D.Utah 1985) [hereinafter cited as Amos II].

Courts and other governmental agencies must realize that the purpose of a church agency is not simply a specific task such as health care or recreation. Central to the church's religious mission is providing a corporate witness to its religious faith. That witness should extend from the director of an agency to the maintenance engineer whose Christian commitment is equally important if the church is to fulfill its religious mission. From top to bottom, it is a church agency's religious obligation to ensure that each of its employees contributes to the agency's corporate witness by embodying the teachings of the Christian faith.

As Baptists, all that we do is related in part to Christ's commandment to "Go ye therefore, and teach all nations, baptizing them in the name of the Father,

and of the Son, and of the Holy Ghost." Matthew 28:19. Any attempt by the state to force Baptist agencies to hire non-Christians or even non-Baptists diminishes our corporate witness and hampers this evangelistic task. In the words of one Baptist educator, "An atheist who scoffs at Christianity might be a competent maintenance engineer, but if he despises and scoffs at Christians and Christian values, he might defeat the mission of a Baptist college [or agency] to create a Christian atmosphere on the campus and instill and strengthen values in our students, teachers, administrators, and other employees."[7]

Turning to the facts in this case, the court had no difficulty finding an

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[7] Amicus recognizes that a separate exemption for religious schools exists under §703, 42 U.S.C. §2000e-2(e)(2), but the legality of this section becomes highly suspect, at least as it applies to colleges and universities, if §702 is struck down.

exercise program to be "non-religious" and a program for aiding the handicapped to be "religious." Amos I, supra; Amos II, supra. This sort of ad hoc evaluation of religious organizations by secular authorities illustrates the inherent problems in the approach suggested by the District Court.

Christians are admonished by the Holy Scriptures to attend to their physical health as a part of their spiritual discipline.[8] Accordingly, a vigorous program of physical exercise may be as "religious" an activity as aiding the handicapped. That the Mormons considered operating a gymnasium that offers physical exercise a religious activity is indicated by the prayer that was offered

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[8]"Know ye not that ye are the temple of God, and that the spirit of God dwelleth in you? If any man defile the temple of God, him shall God destroy; for the temple of God is holy, which temple ye are." I Cor. 3:16-17.

at the dedication of Deseret Gymnasium. Amos I, supra, at 800, n. 15.

The insurmountable problems that are created by the District Court's decision become even clearer when the court's test is applied to other church agencies. Consider the following: a mathematics teacher at a Baptist college; a stenographer at the Southern Baptist Foreign Mission Board; House Counsel at the Baptist Joint Committee; a custodian at a local church; the director of a day care center at a Baptist agency; the director of recreation at a local church; a nurse at a Baptist hospital; the controller of a church pension board; and the librarian at the American Baptist Board of National Ministries. The court might well consider all of these positions to be unrelated to the religious activities of the church, yet each and every one is integral to its religious mission. They are

all part of the unified witness of Baptists.

Turning to the facts in this case, a church-owned gymnasium would in all likelihood also be considered an integral part of a Baptist church's ministry. In fact, many Baptist churches now have ministers of recreation on their paid professional staffs. The District Court's suggestion that such activities are "non-religious" because the same facilities and services are available at a public gymnasium fails to take into account that religious organizations engage in these activities for religious purposes. The mere fact that an activity has been duplicated by secular organizations does not change its religious nature for those in the community of faith.

Viewing both the District Court's decision and 42 U.S.C. 2000e-1, it is obvious that the former rather than the

latter creates excessive governmental entanglement with religion in violation of the First Amendment.

CONCLUSION

For the above-mentioned reasons, amicus urges that the decision of the United States District Court for the District of Utah be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

(11) (10)

Nos. 86-179, 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, et al.,
Appellants,

v.

CHRISTINE J. AMOS, et al.,
Appellees.

On Appeal From The United States District Court For The District Of Utah

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

18 pp

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS CURIAE

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include taking action to eliminate religious discrimination in public and private employment but also involve the preservation of the separation of church and state so that each may effectively carry out their proper roles in society with the minimum of interference from the other.

The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in official capacity, and some on a lay basis, but all recognize the importance of preserving a judicial course that maintains the autonomy and freedom of religious bodies.

SUMMARY OF ARGUMENT

The action of Congress in exempting religious institutions from the operation of Title VII with respect to the exercising of a religious preference in hiring does not resemble any of the state actions previously held by this Court to violate the Establishment Clause. The exemption does not sponsor or lend even indirect financial support to religious institutions, nor does it involve the state in religious affairs. The district court has failed to explain how the exemption advances religion.

This Court has consistently recognized religious exemptions as legitimate means by which Congress may accommodate religious exercise. Rather than invalidate exemptions, this Court has specifically upheld exemptions far more beneficiai to churches than that involved here against Establishment Clause challenges, *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), and has strongly implied that in sensitive areas the lack of such exemptions could itself violate the Establishment Clause, *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

Contrary to the results reached by the district court, Congress may go beyond the minimal requirements of the Free Exercise Clause in accommodating religion. *Walz*, *supra*. What Congress has done in § 702 is to recognize in a limited manner the delicate problem of prohibiting religious institutions from using religious considerations

in their employment decisions. Congress did not exempt religious institutions from the prohibition against race, sex, and national origin discrimination. It simply decided that in the narrow area of religious preference, it was not comfortable attempting to make the fine distinctions necessitated by drawing the line where the district court has chosen to draw it.

ARGUMENT

I. THE RELIGIOUS EXEMPTION IN TITLE VII ADVANCES NONE OF THE EVILS THE ESTABLISHMENT CLAUSE WAS DESIGNED TO PROTECT AGAINST.

Since it was first passed, § 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, has made provisions for allowing religious institutions to exercise a religious preference in hiring their employees. In 1972 § 702 of the Act was amended to provide that religious institutions could exercise this religious preference without the requirement that the employee be engaged in religious activity.[1]

In its decision below the district court has ruled that this sensitivity on the part of Congress to the autonomy of religious institutions amounted to an unconstitutional establishment of religion. The ruling of the district court

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[1] Section 702 in its present form reads as follows:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Prior to the 1972 amendment the word "religious" was contained in the text immediately prior to the word "activities."

has no support in this Court's holdings on the Establishment Clause, and in fact goes against the clear weight of the Court's prior decisions. To expand the prohibition of the Establishment Clause to the extreme point taken by the district court "would be to find in the Constitution a requirement that the government show a callous indifference to religious groups," a position rejected by this Court long ago in *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

The district court correctly noted that in order to find a violation of the Establishment Clause "[t]he aid must further the evils against which the establishment clause was designed to protect—'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970)." *Amos* v. *Corporation of the Presiding Bishop (Amos I)*, 594 F.Supp. 791, 820 (D. Utah 1984) (App. 58A).[2] But the court completely failed to articulate how the existing exemption in § 702 of Title VII furthers any of these evils.

The exemption cannot be said to even remotely lend even indirect financial support to religious institutions. It does not exempt such institutions from any payroll taxes, the payment of minimum wages, or any other expense of employment. Just as clearly, an exemption does not further active involvement of the sovereign in religious activity. Indeed, as everyone admits, the purpose of the exemption is to do the opposite. Finally, there is no sponsorship. No symbolic union is created between the gov-

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[2] Citations to (App. ____) refer to pages in the Appendix to the Jurisdictional Statement filed by the appellants.

ernment and religious institutions by this deliberate distancing of the two.

Also, the government does not by force of law impose unyielding religious considerations on the conduct of all businesses as in *Estate of Thornton* v. *Caldor, Inc.*, 105 S.Ct. 2914 (1985). All the government has done is to allow religious institutions to make religious considerations in hiring without the imposition of government restraints.

II. THIS COURT HAS APPROVED, NOT INVALIDATED, RELIGIOUS EXEMPTIONS.

The district court relies on the statement of the Court in *Wisconsin* v. *Yoder* 406 U.S. 205, 220-221 (1972) (a case in which an exemption was held to be required by the First Amendment), that, "the Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." However, the significance of that statement with respect to the facts of this case pales in light of the decisions of this Court upholding other religious exceptions. Perhaps the two most vital obligations of citizenship are the payment of taxes and military service. Yet this Court has upheld religious based exceptions to both of these against Establishment Clause challenges in *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970), and *Arver* v. *United States [Selective Draft Law Cases]*, 245 U.S. 366 (1918), respectively.

This Court's decision in *Walz* is most significant with respect to this case. As in this case, the exception in *Walz* was granted to religious institutions. Despite the unmistakable financial benefits of the exemption from property taxes involved in that case, the Court found no Establishment Clause violations.

> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

Walz, 397 U.S. at 676-677. It is just this sort of benevolent neutrality that the Congress was exercising when it included the exemption at issue here in Title VII. Congress decided to simply allow churches to decide whether it was in their own best interest to hire employees of a particular faith.

The district court attempted to distinguish *Walz* by pointing to factors present in that case and absent here. First, it attaches great significance to the fact that in *Walz* the state had provided exemptions to a wide range of nonprofit organizations. But this cannot alter the fact that churches under the New York law received exemptions specifically because their property was used for "religious" purposes and not because they fit within some broader definition of charitable purpose. In fact, the Court in *Walz* took pains to emphasize that there was no need to justify the tax exemption for churches on the social welfare services that they might perform. *Id.* at 674.

Next, the district court stresses the long history of property tax exemptions pointed out by the Court in *Walz* and notes a lack of such historical justification in this case. *Amos I*, 594 F.Supp. at 824 (App. 66A-67A). Two points should be made here. First, the Court in *Walz* acknowledged that a long history of existence could not justify a practice if it truly did violate the Establishment Clause. Second, there is a long history of churches being free to

exercise religious preference in the hiring of employees. In fact, there has never been a time in this country when they could not exercise such preference. Prior to the passage of Title VII, no government restraints existed on their hiring policies.

In *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981), the Court was called upon to interpret the exemptions for religious institutions contained in the Federal Unemployment Tax Act, 26 U.S.C. § 3309. The Court gave this exemption a broader interpretation than that adopted by the Secretary of Labor. It held that the exemption covered all employees hired by a church or convention of churches, not just those engaged in religious activity or working in an actual house of worship.

The parallels between the broader exemption approved by the Court in *St. Martin* and the broader exemption struck down here by the district court are obvious. Further, the exemption in *St. Martin* was available only to churches or conventions or associations of churches and to ordained ministers. Congress had specifically eliminated exemptions for a wider range of nonprofit organizations. Yet the Court expressed no concern about the exclusivity of the exemption in *St. Martin*.

In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court interpreted the National Labor Relations Act to exempt religious schools from its coverage. As in *St. Martin*, the Court acknowledged its awareness of the constitutional implications of its interpretation.

The exemption found by the Court in *Catholic Bishop* was broader than that involved here. The Court in *Catholic Bishop* found religious schools completely exempt from all NLRB jurisdiction. Here, § 702 does not com-

pletely exempt religious institutions from all EEOC jurisdictions. The EEOC still has jurisdiction over religious institutions with respect to race and sex discrimination and all other violations of Title VII. The only relief given to religious institutions is in the narrow area of religious preference.

Despite the broader exemption in *Catholic Bishop*, the Court expressed no fear that the exemption would violate the Establishment Clause. On the contrary, the Court expressed fear that the lack of an exemption would present Establishment Clause problems.

In still other cases this Court has noted with approval government policies of accommodating religious exercise through exemption. In *Braunfeld* v. *Brown*, 336 U.S. 599 (1961), while refusing to strike down Sunday closing laws, the Court noted with approval the policy of some states to include religious exemptions in their Sunday closing laws. In *United States* v. *Lee*, 455 U.S. 252 (1982), the Court noted that there is a religious exemption from social security taxes for self-employed persons contained in 26 U.S.C. § 1402(g). The appellees, in their motion to affirm, cite *Bowen* v. *Roy*, 106 S.Ct. 2147 (1986); *Goldman* v. *Weinberger*, 106 S.Ct. 1310 (1986); *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 105 S.Ct. 1953 (1985); *United States* v. *Lee*, 455 U.S. 252 (1982); and *Welsh* v. *United States*, 398 U.S. 333 (1970), as examples of cases where the Court has invalidated exemptions. This is simply not what those cases are about. In those cases, the Court refused to require exemptions where none existed on the basis of the Free Exercise Clause. In none of those cases was an existing exemption struck down as a violation of the Establishment Clause.

The unavoidable import of this Court's decisions in this age of ever expanding government regulation is that

religious exemptions are a proper and vital method by which legislative bodies balance fundamental First Amendment values with other governmental interests. "[T]he Establishment Clause embodied the Framers' conclusion that government and religion have discreet interests which are mutually best served when each avoids too close a proximity to the other." *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 259 (1963) (Brennan, J., concurring).

III. CONGRESSIONAL ACCOMMODATION OF RELIGION MAY EXCEED THE MINIMAL REQUIREMENTS OF THE FREE EXERCISE CLAUSE.

"The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." *Walz*, 397 U.S. 673. Despite this straightforward assertion by the Court that the government may make accommodations to religion beyond the minimum required by the Free Exercise Clause, the district court's analysis draws the line limiting state accommodation precisely at the point where it perceives possible free exercise burdens to end. "Furthermore, the abolution of the governmental exclusion for religious organizations' religious discrimination in secular, nonreligious activities does not present any conflict with the free exercise clause. Consequently, the principle of accommodation espoused in *Walz* has little relevance here." *Amos I*, 594 F.Supp. at 824 (App. 67A).

The greater part of the district court's analysis of the primary effect of the exemption under the tripartite *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), test is actually an analysis of whether the narrower exemption favored

by the district court would violate the appellants' free exercise rights. Finding that the slightly broader exemption presently contained in § 702 of Title VII is not required by the Free Exercise Clause, the district court jumps to the conclusion that the Establishment Clause is violated by such an exemption.

The district court also faults the exemption for not being facially neutral. *Amos I*, 594 F.Supp. at 824 (App. 66A). The court's point here is difficult to understand. The exemption is completely neutral as between competing religions. The only way it could be said to lack facial neutrality is in its treatment of religious institutions as opposed to secular institutions. That such a lack of "facial neutrality" would cause a constitutional problem makes no sense in view of the fact that the district court specifically approved a legislative purpose to accommodate religion. "It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Wallace* v. *Jaffree*, 105 S.Ct. 2479, 2504 (1985) (O'Connor, J., concurring).

As stated earlier, the district court fails throughout its lengthy opinion to articulate in what manner the exemption in § 702 of Title VII advances religion. The court simply states the following conclusion:

> Hence, the exemption contained in § 702, as applied to secular, non-religious activities, violates the establishment clause by granting religious organizations an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices.

Amos I, 594 F.Supp. at 825 (App. 70A). The idea that the Establishment Clause is violated by allowing churches to

advance religion is a perversion of the First Amendment. Churches exist for no other reason.

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Zorach v. *Clauson*, 343 U.S. 306, 313-314 (1952).

IV. IT IS WITHIN THE COMPETENCE OF CONGRESS TO DECIDE TO ACCOMMODATE RELIGIONS IN THE MANNER THEY HAVE CHOSEN IN TITLE VII.

What Congress has done here is simply to decide that in exercising its powers under the Commerce Clause, it could best effectuate its legislative purpose without attempting to regulate an area as closely related to the religious purpose of sectarian institutions as the exercise of a religious preference in hiring. The wisdom of this congressional determination can best be seen in the elements in the application of the complex text devised by

the district court for determining which jobs involve religious activity. The court set out the test as follows:

> First, the court must look at the tie between the religious organization and the activity at issue with regard to areas such as financial affairs, day-to-day operations and management. Second, whether or not there is a close and substantial tie between the two, the court next must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial connection between the activity in question and the religious organization's religious tenets or matters of church administration and the tie under the first part of the test is close, the court does not need to proceed any further and may declare the activity religious. However, where the tie between the religious entity and activity in question is either close or remote under the first prong of the test and the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent, the court must engage in a third inquiry. It must consider the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial relationship between the employee's job and church administration or the religious organization's rituals or tenets, the court must find that the activity in question is religious. If the relationship is not substantial, the activity is not religious.

Amos I, 594 F.Supp. 799 (citation and footnote omitted) (App. 10A-11A).

Simply reading the test should make anyone extemely cautious of entering such a religious thicket. Congress chose to exercise such caution, and it is not for the courts

to force them to go. To enter requires one to examine the meaning and centrality of church doctrine. This can be seen by the application of the test made by the court. In *Amos I* the court determined that the Mormon belief and the desirability of physical exercise and the church's desire to provide for such exercise in an atmosphere that exemplifies those beliefs were not central to basic Mormon tenets. *Id.* at 801 (App. 16A). In *Amos II*, 618 F.Supp. 1013 (D. Utah 1985), the court interpreted Mormon scriptures in order to find that the church's social welfare activities were religious activities, 618 F.Supp. at 1024-1025 (App. 110A-111A). Finally, the court in *Amos II* determined that it would resolve a dispute as to whether it was necessary for church members only to manufacture sacred religious garments, *id.* at 1022, (App. 102A).

This court stated in *Presbyterian Church* v. *Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969), that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." The Court went on to rule that "[t]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." *Id.* at 450. Even if administration of the district court's proposed test did not amount to a violation of the First Amendment, it can hardly be said that Congress' determination not to plunge the EEOC into such murky issues violated the Establishment Clause.

Sympathy for the plight of a long term loyal employee suddenly cast out of his job is quite understandable,

especially when the action appears arbitrary. It is not necessary for the Court to resolve the question of whether the Free Exercise Clause requires the exemption in § 702 to cover employees engaged in purely secular activities. We also express no opinion as to whether application of the exemption to employees in commercial enterprises in direct competition with secular enterprises simply on the basis of ownership by a religious institution would violate the equal protection rights of employees. We believe that the best solution to any possible societal problems caused by an overbroad application of the exemption lies with Congress. However, we firmly believe that resort to the Establishment Clause to remedy the plight of the appellees would work a terrible distortion of the entire body of Establishment Clause case law.

What this court said in *Zorach* v. *Clauson*, 343 U.S. at 314, is equally applicable here:

> This program may be unwise and improvident. . . . Our individual preferences, however, are not the constitutional standard. The constitutional standard is the separation of Church and State.

CONCLUSION

For the reasons stated above, the decision of the District Court of Utah should be reversed.

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Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-179 and 86-401

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UNITED STATES OF AMERICA,

Intervenor-Appellant,

v.

CHRISTINE J. AMOS, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF AMICUS CURIAE

OF THE AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES, THE AMERICAN ASSOCIATION OF BIBLE COLLEGES, THE AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS, THE CHRISTIAN COLLEGE COALITION, THE DEPARTMENT OF EDUCATION SERVICES OF THE CHURCH OF THE NAZARENE, THE DIVISION FOR COLLEGE AND UNIVERSITY SERVICES OF THE AMERICAN LUTHERAN CHURCH, AND THE TRANSNATIONAL ASSOCIATION OF CHRISTIAN SCHOOLS, IN SUPPORT OF THE APPELLANTS

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BRIEF AMICUS CURIAE

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INTERESTS OF AMICI CURIAE

The American Association of Presidents of Independent Colleges and Universities is an organization comprised of 192 presidents of private institutions of higher education. The Association seeks to protect the institutional autonomy and integrity of independent colleges and universities, so that these institutions may fulfill their educational mission in a manner which they deem appropriate.

The American Association of Bible Colleges is a voluntary, non-profit corporation, international in membership, organized for the purpose of accrediting Bible Colleges in the United States and Canada. Approximately 110 Bible Colleges are members of the Association. The common purpose of these schools is to provide an educational environment in which students can obtain an education and training for Christian vocational pursuits. The members of the Association believe that the decision of the district court creates a dangerous precedent because their religious nature and purposes will be diluted if these colleges are compelled to hire employees who do not share their basic religious beliefs.

The American Association of Christian Schools is a voluntary, non-profit association comprised of 1,200 elementary and secondary schools with approximately 15,000 faculty members and 160,000 students. The member schools of the Association are committed to a Christian view of education, and for this reason these institutions feel themselves compelled on religious grounds to hire administrative, support and teaching personnel according to biblical standards.

The Christian College Coalition is an association of 75 colleges and universities which provide a distinctively religious context for the pursuit of a liberal education. All of the member institutions are seriously committed to the historic Christian faith, and they attempt to integrate a religious dimension into their educational endeavors.

The Department of Educational Services of the Church of the Nazarene endeavors to provide a quality education within a Christian environment in the Wesleyan tradition. These efforts are manifested in one seminary, one Bible College, and eight liberal art colleges with the common purpose of preparing professional and lay leadership for the Church. The emphasis in these institutions is on the historical, literary, practical and devotional study of the Bible, and on moral education and instruction in the holiness ethic and life-style.

The Division for College and University Services of the American Lutheran Church supports and serves 12 colleges and 1 high school of The American Lutheran Church ("the ALC"), a Minnesota Nonprofit Corporation and a religious denomination with member churches in 48 states, and one college affiliated with The Lutheran Church in America ("the LCA"). In addition, the Division provides a ministry to public universities and certain other colleges through National Lutheran Campus Ministry, a cooperative agency of the ALC, the LCA, and the Association of Evangelical Lutheran Churches; this campus ministry touches more than 300 college and university campuses across the country. The colleges and universities of the ALC continue to be the church in mission in higher education. They find in the church their historical moorings, a source of their life, and reason for being, without which they cannot live. Through its colleges the church provides environments and opportunities for the development of a sense of Christian vocation, of responsible discipleship, and of reasoned and critical participation in the structures of society. The church finds in its colleges resources by which to interpret and criticize itself and its mission. To fulfill these functions the colleges combine the values of rigorous academic life and personal religious commitment in a self-conscious, explicit and critical fashion. A church-related college, seeing the created order as one of God's gifts to be cherished and preserved rather than a commodity to be despoiled, aims to lead persons to a sense of awe and appreciation and to practices of nurture and care. The ALC colleges hope to educate students toward a sense of vocation that brings healing and wholeness to the world.

The Transnational Association of Christian Schools is a voluntary, non-profit organization comprised of 12 colleges or universities. The Association operates on the conviction that the total campus environment reflects their Christian commitment, which comes from their firm belief in the inerrancy and authority of the Bible, and which must be nurtured by those who share this belief.

This amicus brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

I.

THIS COURT SHOULD BE DISCRIMINATING ABOUT DISCRIMINATION. THIS CASE DOES NOT INVOLVE ANY DISCRIMINATION BY A SECULAR EMPLOYER ON THE BASIS OF RACE OR SEX, NOR EVEN DISCRIMINATION BY A RELIGIOUS EMPLOYER ON THE BASIS OF RACE OR SEX, BUT PROTECTED ACTIVITY OF A RELIGIOUS BODY WHICH CHOOSES TO TAKE INTO ACCOUNT THE RELIGIOUS CONVICTIONS OF ITS OWN EMPLOYEES.

A. **This Case Does Not Involve Forbidden Racial Discrimination In Employment.**

B. **This Case Does Not Involve Forbidden Gender-Based Discrimination In Employment.**

C. **This Case Involves Solely The Permissibility Of An Employment Practice Of Religious Preference By A Religious Body.**

II.

THIS COURT SHOULD DEFER TO THE SOUND DISCRETION OF CONGRESS IN CHOOSING REASONABLE MEANS TO IMPLEMENT LEGITIMATE GOVERNMENTAL ENDS WHICH ARE THEMSELVES REQUIRED OR COMMENDED BY THE CONSTITUTION.

A. **The Provisions Of Title VII Affirmatively Protecting The Employment Practices Of Religiously Affiliated Schools Which Choose To Take Into Account The Religious Convictions Of Their Employees Reflect A Sound And Deliberate Congressional Judgment. That Legislative Judgment Is Entitled To Judicial Deference Because**

Congress Has Broad Latitude In Choosing Means Which It Deems Necessary And Proper To Secure The Guarantees Of The Free Exercise Clause Without Transgressing The Requirements Of The Establishment Clause.

(i) The provisions in Title VII relating to religion reflect a comprehensive legislative scheme that has appropriately balanced competing economic interests of secular employers and the Free Exercise rights of religiously motivated employees of secular employers, as well as the Free Exercise rights of religious employers and the economic interests of secular job applicants.

(ii) The provisions in Title VII relating to religion do not offend the requirements of the Establishment Clause.

B. The Provisions Of Title VII Affirmatively Protecting The Employment Practices Of Religiously Affiliated Schools Which Choose To Take Into Account The Religious Convictions Of Their Employees Reflect A Sound And Deliberate Congressional Judgment. That Legislative Judgment Is Entitled To Judicial Deference Because Congress Has Broad Latitude In Choosing Means Which It Deems Necessary And Proper To Effectuate The Constitutional Rights Of These Schools To Associational And Academic Freedom.

(i) Congress may accommodate the right of religious bodies, no less than that of civil rights organizations, political parties, and labor unions, to associate in educational endeavors free from unnecessary governmental regulation.

(ii) Congress may accommodate the right of religiously affiliated colleges and universities,

no less than that of public and independent institutions of higher education, to an appropriate measure of academic freedom to select those who teach and work in these schools.

ARGUMENT

I.

THIS COURT SHOULD BE DISCRIMINATING ABOUT DISCRIMINATION. THIS CASE DOES NOT INVOLVE ANY DISCRIMINATION BY A SECULAR EMPLOYER ON THE BASIS OF RACE OR SEX, NOR EVEN DISCRIMINATION BY A RELIGIOUS EMPLOYER ON THE BASIS OF RACE OR SEX, BUT PROTECTED ACTIVITY OF A RELIGIOUS BODY WHICH CHOOSES TO TAKE INTO ACCOUNT THE RELIGIOUS CONVICTIONS OF ITS OWN EMPLOYEES.

As this Court has taught repeatedly, not all forms of discrimination are constitutionally proscribed In *McGowan v. Maryland,* 366 U.S. 420 (1961), for example, this Court unanimously rejected the claim that the Maryland Sunday closing law violated the requirements of the Equal Protection Clause. In *McGowan* Chief Justice Warren wrote: "This Court has held that the 14th Amendment permits the States a wide scope of discretion in enacting laws which affect some group of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* at 425. Amici demonstrate in the remainder of this brief the rationality of the statutory scheme enacted by Congress and improvidently invalidated by the district court. As in *McGowan*, the record here "is barren of any indication that this apparently rational basis does not exist, [or] that the statutory distinctions are invidious. . . ." *Id.* at 426. The standards developed by this Court for Equal Protection

analysis, then, require the judiciary to make appropriate distinctions about the very concept of discrimination.[1]

In 1972 Congress made a deliberate and reflective statutory determination that religious employers may take into account the religious convictions (or lack of them) of their own employees without thereby offending the Equal Protection requirements of the fifth amendment Due Process Clause which are effectuated in the Civil Rights Act of 1964 [hereinafter, Civil Rights Act]. Amici argue in Part II of this brief that this congressional determination is entitled to considerable judicial deference because, far from acting irrationally or with an intent to promote invidious discrimination in the 1972 amendments to the Civil Rights Act, Congress sought to secure in this legislation values which are themselves required or commended by the constitution.

In order to underscore the need to be discriminating about discrimination, Amici refer throughout this brief to *religious preference* rather than to *religious discrimination* when describing the practice of a religious employer taking into account the religious convictions of its own employees. Amici readily concede that such a practice would be invidiously

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[1]Focusing on the practices of secular employers, a recent publication of the United States Commission on Civil Rights notes the following differences among cases involving discrimination on the basis of race, sex and religion: "Most religious discrimination cases . . . involve interests, dynamics, and problems not present in race or sex cases. To begin with, the interests that those affected are seeking to protect in race and sex cases are different from those at stake in religious discrimination cases. In race and sex cases complainants assert a constitutionally protected right not to be treated differently on account of such status, whereas complainants in religious discrimination cases generally claim that the uniform application of neutral rules impinges on a constitutionally protected right to be different. In the former case the 14th amendment is the ultimate source of constitutional protection, while in the latter instance 1st amendment rights are also implicated." U.S. Comm. on Civil Rights, *Religion in the Constitution: A Delicate Balance* 41 (1983); and see U.S. Comm. on Civil Rights, *Religious Discrimination: A Neglected Issue* (1979).

discriminatory if engaged in by the government itself or by a private secular employer, but argue in this brief that preference for a religiously motivated employee asserted by a bona fide religious organization does not constitute invidious discrimination at all, but is permissible accommodation of religious freedom protected under the first amendment. See McConnell, *Accommodation of Religion*, 1985 Sup.Ct. Rev. 1.

As is suggested in the report of the United States Civil Rights Commission cited in note 1, *supra*, this conclusion is buttressed by the text of the constitution itself. The first amendment affirmatively protects the free exercise of religion. By contrast, racial discrimination by the government and in many instances by private parties not only does not have any textual support in the constitution, but is positively interdicted by the clear commands of the thirteenth, fourteenth and fifteenth amendments as well as by a series of civil rights statutes enacted under the enforcement provisions of these amendments. Although the history immediately surrounding the adoption of the fourteenth amendment does not suggest much solicitude for gender-based discrimination, see, e.g., *Bradwell v. Illinois*, 16 Wall. (83 U.S.) 130 (1873), *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36 (1873), the subsequent enactment of the nineteenth amendment manifested the will of this country that irrational discrimination on the basis of sex is similarly impermissible.[2] Hence the insistence in this brief on the term "religious

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[2]This Court has, of course, clarified that gender-based discrimination by the federal government which is no more than "romantic paternalism" and which in practical effect puts women "not on a pedestal, but in a cage," is proscribed by the equal protection component of the fifth Amendment. *Frontiero v. Richardson*, 411 U.S. 677 (1973). And it has articulated a higher standard of judicial review than that specified in *McGowan v. Maryland, supra*, for cases involving an equal protection challenge to state legislation involving sex discrimination. *Craig v. Boren*, 429 U.S. 190 (1976). See also *Rostker v. Goldberg*, 453 U.S. 57 (1981) (applying heightened *Craig* standard to federal legislation).

preference" rather than "religious discrimination" is more than a linguistic nicety. It is a necessary mode of indicating the difference between legitimate exercise of a constitutionally protected right by a religious body and invidious discrimination on the basis of race or sex.

A. This Case Does Not Involve Forbidden Racial Discrimination In Employment.

Amici readily acknowledge that under the 1972 amendments to the Civil Rights Act there is no statutory ground for a religious employer to assert that it is immune from Title VII litigation if it engages in forbidden racial discrimination. A national study of administrators of religiously affiliated colleges and universities disclosed, moreover, that the set of facts confronted in *Bob Jones University v. United States*, 461 U.S. 574 (1983), is probably epiphenomenal, for none of the respondents in this survey maintained an employment policy of racial discrimination. See E. Gaffney and P. Moots, *Government and Campus: Federal Regulation of Religiously Affiliated Higher Education* 33 (1982).

In any event, *Bob Jones University*, *supra*, has laid to rest the general proposition that the Free Exercise Clause affords absolute protection to tax-exempt, religiously affiliated schools which discriminate on the basis of race. 461 U.S. at 602-604. More to the point, *Bob Jones University* is wholly inapplicable to the instant case, which does not involve any allegation of unlawful racial discrimination on the part of the church Appellant. The important goals of Congress in seeking to eradicate the vestiges of racial discrimination in employment, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), are simply not at issue in this case.

B. This Case Does Not Involve Forbidden Gender-Based Discrimination In Employment.

Amici likewise acknowledge that under the 1972 amendments to the Civil Rights Act there is no statutory ground for a religious employer to assert that it is immune from

Title VII litigation if it engages in forbidden gender-based discrimination in employment.[1]

The same national study referred to above, moreover, likewise disclosed that administrators of religiously affiliated colleges and universities do not generally maintain an employment policy of gender-based discrimination that could be arguably defended on free exercise grounds. See E. Gaffney and P. Moots, *Government and Campus: Federal Regulation of Religiously Affiliated Higher Education* 33 (1982). It is, moreover, highly significant that the record in the leading case involving federal regulation of these colleges and universities, *Grove City College v. Bell*, 465 U.S. 555 (1984) is without any showing whatever that the college in question had committed any act of unlawful sex discrimination. *Id.* at 578-579 (Powell, J., concurring). More to the point, *Grove City College* is wholly inapplicable to the instant case, which does not involve any allegation of unlawful gender-based discrimination on the part of the church Appellant. The important goals of Congress in seeking to eradicate the vestiges of irrational sex discrimination in employment, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), are simply not at issue in this case.

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[1]Relying on the legislative history surrounding the 1972 amendments to Title VII, lower federal courts have declined to grant absolute immunity to religious organizations and religiously affiliated schools charged under Title VII with unlawful sex discrimination. See, e.g., *Rayburn v. General Conference of Seventh-day Adventists*, 772 F. 2d 1164 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 3333 (1986); *EEOC v. Pacific Press Pub. Assn.*, 676 F. 2d 1272 (9th Cir. 1982); *EEOC v. Mississippi College*, 626 F. 2d 477 (5th Cir. 1980). A much closer question would be presented if the government were to attempt to use the federal civil rights laws to alter the doctrinal convictions of a religious body with respect to gender roles in its ministry. See, e.g., *McClure v. Salvation Army*, 460 F. 2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). In any event, these cases do not control the instant case, which does not involve any allegation of unlawful discrimination on the basis of sex.

C. This Case Involves Solely The Permissibility Of An Employment Practice Of Religious Preference By A Religious Body.

This case does not involve invidious discrimination by a secular employer on the basis of race or sex, nor even discrimination by a religious employer on the basis of race or sex. Because the record in this case is devoid of any colorable claim of improper discrimination on the basis either of race or sex, this Court should not rely on any of its decisions involving those prohibited categories of employment discrimination.

What this case does involve is solely the freedom of a religious body which chooses to take into account the religious convictions of its own employees. The national study of administrators of religiously affiliated colleges and universities referred to above disclosed considerable diversity among the respondents as to their actual practices involving religious preference in employment. E. Gaffney and P. Moots, *Government and Campus* 32-39 (1982). It is apparent from this study that not all church-related schools choose on educational policy grounds to take into account the religious convictions of their employees, or at least not in all employment positions.

Various religious educators have articulated a rationale for religious preference differently. For example, at a 1976 conference in Washington, D.C., the spokesman for Saint Olaf College in Northfield, Minnesota, stressed the importance of the relationship between that college and the American Lutheran Church; and he concluded: "Most importantly of all, we hire people who are committed to [the religious values identified with Lutheran Christianity]. All the programs and money in the world cannot help us achieve our stated ideals unless most of our faculty and administration embrace them out of conviction. When we hire, we try to hire the most capable chemists, artists or deans we can find; but we hire only those who convince us that they believe in our distinctness as a college of the Church, and who

persuade us that they cherish our ideals even if they don't share our religious and ethnic heritage." As cited in E. Gaffney and P. Moots, *id.* at 41. The distinguished Catholic educator, James Tunstead Burtchaell, C.S.C., stated the religious preference policy of the University of Notre Dame as follows: "At Notre Dame we have no task more important than to recruit and invite into our midst men and women who, beyond their being rigorously given over to the profession of learning, are likewise dedicated to a life of religious belief. If we are to be a Christian University, we must have a critical mass of Christian teachers. If Notre Dame is to remain Catholic, the only institutional way for assuring this is to secure a faculty with predominant representation of committed and articulate believers who purposefully seek the comradeship of others to weave their faith into the full fabric of their intellectual life." As cited *id.*

Other religious educators, reflected primarily among the Amici by member institutions of the American Association of Bible Colleges and the Christian College Coalition, would insist on the need to take into account the religious convictions of their employees in all of their employment decisions. They do so not out of any invidious intent or purpose to inflict economic harm on another, see *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), but because in their view all of the employees at a Christian school are or should be engaged in a common effort to enable young men and women to integrate fully the Christian faith with all dimensions of their study, their work, and their life. For example, Dr. Hudson Taylor Armerding, who served as President of Wheaton College from 1965 to 1982 stated recently: "The specific philosophy and goals of an evangelical Christian college are not simply enunciated in the classroom, but they are demonstrated throughout the whole life of the institution. Education includes the interaction of students with all college personnel (not just faculty) so that regardless of who a student interacts with, there will be a consistent transmission of a spiritual ideal. In surveys of Wheaton

College alumni conducted 10-20 years after graduation, we found that students do not remember the content of courses nearly as much as they remember interactions with people. The quality of individuals on campus is essential to the ministry of the college. To interject uncommitted individuals into non-faculty positions on the basis that they are not teaching the Bible does not recognize the essential mission or fellowship of an evangelical Christian college." Affidavit of Dr. Hudson Taylor Armerding, *Seattle Pacific University v. Haas*, W. D. Wash., No. C84-1787.[4]

The reality of diversity in perspectives among religious educators, moreover, does not support the conclusion that no church-related school may ever take into account the religious convictions of its employees without thereby violating the Civil Rights Act, for that would have the effect of imposing on church-related schools the very uniformity in matters of religious choice which both of the Religion Clauses militate against. Nor, as the district court would have it, does it follow that a bright line should be drawn between those jobs which the *government* deems (presumably on secular grounds) to be "religious" and those which the government deems to be "secular," for that is to ignore the central value of religious autonomy secured in the Religion Clauses. The point of the first amendment is that this kind of line-drawing is to be done, if at all, by religious bodies themselves rather than by the government. See, e.g., Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373 (1981).

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[4]A copy of this affidavit has been served on the parties, and has been filed with the Clerk and the Librarian of this Court.

II.

THIS COURT SHOULD DEFER TO THE SOUND DISCRETION OF CONGRESS IN CHOOSING REASONABLE MEANS TO IMPLEMENT LEGITIMATE GOVERNMENTAL ENDS WHICH ARE THEMSELVES COMMENDED OR REQUIRED BY THE CONSTITUTION.

As is obvious from the fact the district court chose to invalidate an Act of Congress, the legislative branch did not choose to draw a bright line between the "religious" and the "secular" activities of a religious organization. To the contrary, in the 1972 amendments Congress drew the lines in such a way as to maximize freedom of choice for religious bodies without attempting to endorse or support any religious body in preference to another. That legislative determination is entitled to considerable deference from this Court because the accommodation of religion which the Congress sought to achieve is reasonable and plainly within its constitutional authority. As Justice O'Connor stated last Term: "Even where the Free Exercise Clause does not compel the Government to grant an exemption, the Court has suggested that the Government in some circumstances *may voluntarily choose* to exempt religious observers without violating the Establishment Clause." *Wallace v. Jaffree*, 472 U.S. ___, 105 S.Ct. 2479, 2504 (O'Connor, J., concurring) (1985) (emphasis added); and see *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970), and *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). See also McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

A. The Provisions Of Title VII Affirmatively Protecting The Employment Practices Of Religiously Affiliated Schools Which Choose To Take Into Account The Religious Convictions Of Their Employees Reflect A Sound And Deliberate Congressional Judgment. That Legislative Judg-

ment Is Entitled To Judicial Deference Because Congress Has Broad Latitude In Choosing Means Which It Deems Necessary And Proper To Secure The Guarantees Of The Free Exercise Clause Without Transgressing The Requirements Of The Establishment Clause.

As *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), teaches, this Court is not powerless to invalidate an Act of Congress which it deems to be violative of the Constitution. But it is instructive that since *Marbury* was decided in 1803, only seven Acts of Congress have been invalidated under the first amendment.[5] Of these seven cases, only two, *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Aquilar v. Felton*, 473 U.S. __ (1985) involved the Establishment Clause. This Court has never invalidated an Act of Congress on the ground that the Congress erred in attempting to accommodate the sensitive needs of religious bodies deemed by Congress to be protected under the Free Exercise Clause.

In the entire history of the republic a little over a hundred federal laws have been invalidated by this Court in whole or in part.[6] By contrast, this Court has invalidated over a thousand state constitutional and statutory provisions and municipal ordinances.[7]

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[5] *Aquilar v. Felton*, 473 U.S. __ (1985); *Chief of Capitol Police v. Jeannette Rankin Brigade*, 409 U.S. 972 (1972); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Schact v. United States*, 398 U.S. 58 (1970); *United States v. Robel*, 389 U.S. 258 (1967); and *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

[6] Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation* 1597-1619 (1973), and 1978 Supplement S272-S274 (1979) (listing all Acts of Congress held to be unconstitutional). But see *INS v. Chadha*, 462 U.S. 919 (1983) (White, J., dissenting) (listing Acts of Congress cast in constitutional doubt by ruling on Presentment Clause).

[7] See Congressional Research Service, *The Constitution*, *supra* note 6, at 1621-1785, and Supplement at S276-S293.

The sheer disproportion between invalidation of Acts of Congress and of state constitutional provisions and legislative enactments cannot be explained away as a failure of nerve or as a merely self-protective instinct on the part of this Court. On the contrary, it reflects several themes fundamental to American constitutional jurisprudence. First, this empirical record of judicial behavior reflects a deference to constitutional determinations of the Congress as a coordinate and equal branch of government. Such deference does not, of course, strip this Court of the power to nullify an Act of Congress when it is found to violate the no-establishment principle. But the very fact that this Court has seen fit to do so only twice, *Tilton v. Richardson, supra,* and *Aquilar v. Felton, supra,* supports the view that a more deferential standard obtains with respect to federal legislation than with respect to state legislation, even where federal and state statutes bear on the same general theme. See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (distinguishing the Connecticut Sunday closing law from § 701(j) of the Civil Rights Act of 1964, requiring employers to make reasonable accommodations of the religious practices of employees).

Second, this Court has since 1937 shown considerable deference to the policy determinations of the Congress predicated upon its plenary power under the Commerce Clause. See, e.g., *Russell v. United States,* 471 U.S. 858 (1985); *United States v. Enmons*, 410 U.S. 396 (1973); *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264, 307-313 (1981) (Rehnquist, J., concurring); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Katzenbach v. McClung*, 279 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

It is late in the day for this Court to reassert judicial authority to rewrite the comprehensive legislative scheme contemplated by Congress in enacting the Civil Rights Act of 1964 and in adopting amendments to that landmark

legislation in 1972. To the contrary, the appropriate standard of judicial scrutiny of the provision of Title VII challenged in this litigation is that articulated by Chief Justice Marshall long ago in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819): "The [Necessary and Proper Clause] . . . cannot be construed to restrain the powers of Congress or to impair *the right of the legislature to exercise its best judgment in the selection of measures,* to carry into execution the constitutional powers of the government." *Id.* at 420; see also at 415, 419. (Emphasis added).

(i) The provisions in Title VII relating to religion reflect a comprehensive legislative scheme that has appropriately balanced the competing economic interests of secular employers and the Free Exercise rights of religiously motivated employees of secular employers, as well as the competing Free Exercise rights of religious employers and the economic interests of secular job applicants.

As amended in 1972, Title VII represents a comprehensive legislative attempt to balance a variety of interests which Congress sought either to regulate or to deregulate and leave free of governmental regulation. In the statutory definition of the term "religion," found in § 701 (j) of the Act, Congress intended to make it an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for the religious beliefs and practices of its employees. As is indicated below, this Court has never ruled that it is constitutionally impermissible for Congress to strike the balance in favor of religiously motivated employees of secular employers.

In § 702, as amended in 1972, Congress clearly intended to allow religious bodies and religiously affiliated schools the freedom to take into account the religious convictions (or lack of them) of their employees. The balance struck by Congress was not that this religious freedom was to be protected under the statute only with respect to those activities

of a religious body or a religiously affiliated school which are thought to be "religious" by the government. To the contrary, in accepting the Ervin Amendment, Congress expressly chose to afford statutory protection to religious employers, allowing them to maintain a policy of religious preference with respect to all of their activities.[8] This provision, challenged directly in the instant litigation on a record clearly involving not simply a discharge on secular grounds but sensitive matters of church discipline, has never been the focus of a ruling by this Court.[9]

In 1964 Congress also enacted in § 703(e)(1) a provision that allows any employer to take an individual's religion into account if that factor is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." The Report of the House Judiciary Committee suggests that this provision is "very limited" and is available to an employer only in "those rare situations where religion or national origin is a bona fide occupational qualification." H.R. Rep. No. 88, 88th Cong., 1st Sess. (1963). Discussing the BFOQ exception in the context of sex discrimination, this Court has accepted the view that "the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); see also *McDonald v. Santa Fe Transportation Co.*, 427 U.S. 273, 279-280 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

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[8]The district court set out much of the legislative history of § 702 as amended in 1972. App. 25a-39a. For a concise treatment of the legislative history of all three provisions in Title VII relating to religiously affiliated schools, see P. Moots and E. Gaffney, *Church and Campus: Legal Issues in Religiously Affiliated Higher Education* 40-54 (1979).

[9]Two lower federal courts have cast doubt in dictum on the constitutionality of § 702. *King's Garden, Inc. v. FCC*, 498 F.2d 51, 53 (D.C.Cir.), *cert. denied*, 419 U.S. 996 (1974); and *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass 1983).

For the very reason that the BFOQ exception is narrow, the other provisions of Title VII[10] relating to religious preference should not be construed in such a way as to telescope all permissible accommodation of the interests of religious employers down to the limits of rationality articulated in § 703(e)(1). But this is the very effect of the tripartite test devised by the district court for determinations of when the protection of § 702 should be afforded to a religious employer. In the guise of constitutional interpretation, the district court has in reality indulged in the rewriting of Title VII in such a way as to allow a religious employer to maintain a policy of religious preference only when it would otherwise qualify for the BFOQ exception.

(ii) The provisions in Title VII relating to religion do not offend the requirements of the Establishment Clause.

In *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977) this Court had the opportunity to rule directly on the constitutionality of § 701(j). It did not find the congressional enactment impermissible, but only ruled that the employer was not bound to suffer undue hardship in

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[10]In 1964 Congress also enacted in § 703(e)(2) a provision which allows religiously affiliated schools to maintain a policy of religious preference if the school meets either of two statutory criteria: (a) support, control, or management by a religious body, or (b) orientation of the curriculum toward the "propagation of a particular religion." For a discussion of the inadequacy of these statutory criteria in protecting the legitimate educational policy interests of religiously affiliated schools, see E. Gaffney and P. Moots, *Government and Campus* 48-49, 75-80 (1982). Appellees argue that § 703(e)(2) adequately protects the interests of religiously affiliated schools. This argument is without merit if only because of the straitjacket which Appellees have already persuaded the district court to impose on § 702. It takes little imagination to assume that on a later day other litigants with the same ideological conviction of the Appellees may be found to argue for similar constrictions on § 703(e)(2).

accommodating the religious interests of its employees.[11] In *Estate of Thornton v. Calder, supra.*, two members of this Court indicated in dictum their view that this provision does not violate the Establishment Clause. 472 U.S. 703, 711 (O'Connor, J., concurring). Most recently, in *Ansonia Bd. of Education v. Philbrook,* No. 85-495, this Court did not so much as intimate any doubt about the constitutionality of § 701(j). In short, whenever this Court has had an opportunity to rule or to comment on § 701(j), it has favored the balance struck by Congress in this provision as a reasonable accommodation of religion.

Analogously, the balance struck by Congress in § 702 is likewise permissible under the Establishment Clause, either under the tripartite test developed by this Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), or under a test which relies primarily on the original intent of the framers of the Establishment Clause, as was suggested in *Marsh v. Chambers*, 463 U.S. 783 (1983).

Under the *Lemon* test, § 702 clearly was enacted for a legitimate secular purpose, and does not entangle the government excessively in religious matters. App. at 25a-41a, and 70a-75a. Ironically, the requisite secularity was found by the district court to inhere precisely in the very distancing of the government from excessive entanglement in religious matters which Congress sought to achieve in the 1972

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[11] After its decision in *Hardison* this Court has repeatedly declined to review the decisions of Courts of Appeal, all of which have sustained § 701(j) against constitutional attack. *McDaniel v. Essex International, Inc.*, 696 F.2d 34 (6th Cir. 1982), 571 F.2d 338 (6th Cir. 1978); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir.), *cert. denied*, 102 S.Ct. 587 (1981); *Nottleson v. Smith Steelworkers*, 643 F.2d 445 (7th Cir.), *cert. denied*, 102 S.Ct. 587 (1981); *Anderson v. General Dynamics*, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1006 (1982); 589 F.2d 397 (9th Cir. 1978, *cert. denied*, 442 U.S. 921 (1979); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 99 S.Ct. 843 (1979); and *Cooper v. General Dynamics*, 533 F.2d 163 (5th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

amendment by allowing religious employers broad freedom to maintain a policy of religious preference with respect to all their activities. Nonetheless, the district court concluded that as applied to "secular" activities, § 702 has the impermissible primary effect of advancing religion "by granting religious organizations an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices." App. at 70a. The conceptual error of the district court is manifest almost in the very statement of its conclusion, for under the analysis adopted by the district court virtually any accommodation of religion which does not measure up to a secular standard of rationality would be a violation of the Establishment Clause. This is the very error corrected by this Court in *Thomas v. Review Bd.*, 450 U.S. 707 (1981). It should be clear that religious bodies need the freedom to engage in activities which might seem secular to secular evaluators, but which in the eyes of the members of the religious body are an integral part of their religious mission in the world.[12] As

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[12]With vicious circularity the district court in the instant case concedes quite broadly that "religious authority necessarily pervades all the activities in which a religious organization engages" App. 72a, a proposition firmly established in this record with respect to the religious tenets of the Mormons relating to physical well-being, App. 11a-13a, 71a-72a, and which could easily be replicated in other religious traditions which, for example, give special attention to dietary requirements. Nevertheless, rather than reaching the obvious conclusion that Congress might reasonably agree with this proposition, the district court felt compelled by the Establishment Clause to inquire further into the substantiality of the relationship between a particular activity of a religious body and that body's religious rituals or tenets. *Id.* at 11a. On this test, he ruled that the activities of the Appellant Mormon Church in conducting Deseret are not religious, *id.* at 18a, without offering any explanation why activities which on his own view, let alone that of the Appellant chruch, are "pervade[d]" by religious authority are not by that very fact religious activities protected under the Free Exercise Clause. A year later the district court concluded that Deseret Industries, which terminated the employment of the lead Appellee, Christine Amos, and which operates a Goodwill-type

the Court of Appeals stated in *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979): "the value judgments and sense of priorities of the regulator and the regulatee are likely to be grounded in wholly different concerns." *Id.* at 77. For this reason this Court should again clarify that in our constitutional order the delicate task of defining religion is not to be undertaken solely according to the secular lights of those who are unfamiliar with, or even hostile to, religious experience and value. See F. Schleiermacher, *On Religion: Speeches to Its Cultured Despisers* (1799).

Under a more flexible approach to Establishment Clause matters adopted by this Court in *Marsh v. Chambers*, 463 U.S. 483 (1983), a long-standing historical practice should not be invalidated except for some compelling justification which necessitates that result. The district court did not undertake any analysis of § 702 under this standard of review. When analyzed in this perspective, § 702 clearly passes muster for two reasons. First, one of the obnoxious practices indulged in by colonial governments had been the licensing and regulation of dissenting preachers and religious teachers. The framers of the first amendment clearly intended to deny such regulatory power to the new national government. See C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964). Second, education in this country from the colonial period until well into the nineteenth century was predominantly, indeed virtually exclusively, the province of the church rather than the state. See, e.g., L. Cremin, *American Education: The Colonial Experience, 1607-1783* (1970). Third, during this period, which includes the period of the adoption and ratification of the first amendment, there was no attempt whatever by the federal government to define with precision which

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thrift store open to the general public, is a protected "religious activity" of the Appellant church, and therefore did not even discuss the standard which the court had used to reach an opposite conclusion with respect to Deseret. App. 105a-116a.

activities of religious bodies are "religious" in character and which are "secular." In adopting the deregulatory Ervin amendment in 1972, Congress was thus returning the country to a long-standing historical practice which predated not only the 1964 Civil Rights Act, but also the adoption of the first amendment itself: the practice of letting a religious body choose on religious grounds those persons whom it prefers to employ to carry out its religious mission, however it chooses to define that mission on religious rather than secular grounds.[13]

Although the district court was of the view that "the principal [sic] of accommodation espoused in *Walz* has little relevance here," App. 67a, this principle is in the view of the Amici at the heart of a correct assessment of § 702. There may be a point where in attempting to accommodate religion, Congress or a State legislature crosses over the limits imposed by the Establishment Clause, but that point was not reached in § 702, which confers no "direct and immediate" economic benefit from public funds to any religious body or to their schools, which surely does not prefer any religious group over another, and which does not involve the government in active support of any religious viewpoint. See *Committee for Public Education and Religious Liberty v. Nyquist*, 413

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[13]In *King's Garden v. FCC*, 498 F.2d 51, *supra*, the Court of Appeals worried about an unfair commercial advantage which a hypothetical religious body might gain over secular competitors if it were, for example, to take over the operation of a professional football team. Because it is not transparently clear that the recruitment of the Redskins solely on the basis of their denominational affiliation would lead to victory against the Detroit Lions on the playing field (any more than it did in the Roman Colosseum), perhaps it is wiser not to worry about such "imaginable but totally implausible evils" *Wolman v. Walter*, 433 U.S. 229, 260, note 6 (1977) (Marshall, J., concurring and dissenting) until they actually occur. In addition, the commercial advantage, if any, of a religious body which engages in a wholly secular activity is offset by the requirement that the body pay federal income tax on unrelated business income. I.R.C. §§ 511-513.

U.S. 756 (1973); and *Wallace v. Jaffree*, 472 U.S. ___, 105 S. Ct. 2479, 2504 (1985) (O'Connor, J., concurring). The only "support" of religion that can seriously be thought to flow from § 702 is the wholly permissible goal of leaving religious bodies free of governmental regulation of their employment decisions which implicate religious convictions.

Accommodation of religion is not to be thought of as prohibited by the Establishment Clause. As Professor Tribe has suggested: "there are necessary relationships between government and religion; government cannot be indifferent to religion in American life; far from being hostile or even truly indifferent, it may, and sometimes even must, accommodate its institutions and programs to the religious interests of the people." L. Tribe, *American Constitutional Law* 822 (1978); and see Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 Notre Dame L. Rev. 311 (1986). However wide the channel between permissible accommodation of religion and forbidden establishment, see *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting), religious bodies and religiously affiliated schools will not be able to navigate between this Scylla and Charybdis if Congress itself is not allowed much discretion to chart straits thought by the judiciary to be perilous. To the contrary, because Congress is well equipped institutionally to engage in the balancing of interests that clearly merit protection under the Free Exercise Clause, this Court should trust that for the most part Congress will discharge its legislative task with appropriate respect for the Constitution that they are duty-bound by their oath of office to uphold. See L. Tribe, *American Constitutional Law* 13-14 (1978). As Chief Justice Marshall stated with respect to state legislation sustained in *Fletcher v. Peck*, 6 Cranch (10 U.S.) 87 (1809), "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be construed as void." *Id.* at 128.

This conclusion is supported by the text of the first amendment, which prohibits the prohibition of free exercise of religion. Since Congress is required to permit free exercise, its efforts to do so should not be construed as prohibited support of religion. To the contrary, this Court should adopt the sensible conclusion that what the Congress deems *necessary* to effectuate the Free Exercise Clause is for that very reason constitutionally *permitted*.

This Court should sustain § 702 because Congress has broad latitude in choosing means which it deems necessary and proper to secure the guarantees of the Free Exercise Clause without transgressing the requirements of the Establishment Clause.

B. The Provisions Of Title VII Affirmatively Protecting The Employment Practices Of Religiously Affiliated Schools Which Choose To Take Into Account the Religious Convictions Of Their Employees Reflect A Sound And Deliberate Congressional Judgment. That Legislative Judgment Is Entitled To Judicial Deference Because Congress Has Broad Latitude In Choosing Means Which It Deems Necessary And Proper To Effectuate The Constitutional Rights Of These Schools To Associational And Academic Freedom.

It is well settled that in reviewing an Act of Congress, courts should sustain the legislation if it is a legitimate exercise of any power granted to the Congress. Although the Necessary and Proper Clause is not an independent ground of congressional authority, when it is coupled with the duty of Members of Congress to uphold other freedoms which are constitutionally protected, legislation enacted on that basis is entitled to judicial deference.

(i) Congress may accommodate the right of religious bodies, no less than that of civil rights organizations, political parties, and labor unions, to associate in educational endeavors free from unnecessary governmental regulation.

Although freedom of association is not expressly protected in so many words in the text of the constitution, it is now beyond cavil that the first amendment protects the civil liberties not simply of isolated atoms, but also of persons working in concert for a common end. The right of associational freedom is now secured not only for civil rights organizations, *NAACP v. Alabama,* 357 U.S. 449 (1958), but also for labor unions, *United Transportation Union v. Michigan,* 401 U.S. 576 (1971), and political parties, *Buckley v. Valeo,* 424 U.S. 1 (1976). All these cases stand for the proposition that people have "a right to join with others to pursue goals independently protected by the first amendment." L. Tribe, *American Constitutional Law* 702 (1978). The very fact, moreover, that a religious body is a *community* of believers requires the conclusion that religious bodies enjoy at least the same constitutional protection against deprivation of their associational freedom as is enjoyed by secular groups or associations. *McDaniel v. Paty,* 435 U.S. 618, 641 (1978) (Brennan, J., concurring). This Court should sustain § 702 because Congress may accommodate the right of religious bodies, no less than that of civil rights organizations, political parties, and labor unions, to associate in educational endeavors free from unnecessary governmental regulation.

(ii) Congress may accommodate the right of religiously affiliated colleges and universities, no less than that of public and independent institutions of higher education, to an appropriate measure of academic freedom to select those who teach and work in these schools.

Like associational freedom, academic freedom is not expressly protected in the text of the constitution, but is now thought fundamental to the safeguarding of other first amendment values, including freedom of speech. See, e.g., *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978) (Opinion of Powell, J.); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); and *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Among the essential rights secured to an educational institution under the rubric of academic freedom is the right to choose on appropriate educational policy grounds those who teach in the institution and how they shall teach the particular message which that institution chooses to transmit. See *Sweezy, supra*, 354 U.S. at 261-263 (Frankfurter, J., concurring). As was suggested at the outset of this brief, Amici concede that academic freedom may not be used as a cloak to cover employment practices in educational institutions which are discriminatory on the basis either of race or sex. Where, however, a nongovernmental educational institution is committed to handing on religious meaning and value as part of its educational mission, that choice is surely worthy of respect. And where, as the legislative history of Title VII so plainly supports, Congress attempted to effectuate its respect for the academic freedom of religiously affiliated schools by enacting § 702, see P. Moots and E. Gaffney, *Church and Campus, supra*, this Court should sustain that legislation because Congress may accommodate the right of religiously affiliated educational institutions, no less than that of their sister institutions in the public and independent sectors of education, to an appropriate measure of academic freedom to select those who teach and work in these schools.

CONCLUSION

For the reasons stated above, Amici urge this Court to reverse the judgment of the district court.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 5, 1987, I served the within *Amicus Curiae Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 5, 1987, at Los Angeles, California.

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-179 and 86-401

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,
v.
CHRISTINE J. AMOS, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellants,
v.
CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Utah

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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UNITED STATES OF AMERICA,
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Appellees.

On Appeal from the United States District Court for the District of Utah

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the

Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civil education, youth activities, and communications. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States, particularly when the Religion Clauses of the Constitution are implicated.

The Conference has a longstanding interest in the proper interpretation of the Religion Clauses of the first amendment. As *amicus curiae* in this Court, it has stressed the importance of applying the Clauses consistent with their generative history.[1] In this case, the district court ruled that a federal statute designed to mitigate involvement by the government in religion was unconstitutional under the Establishment Clause. Moreover, it invalidated the provision as if the statute affirmatively authorized action to advance religion in violation of the Clause.

The district court's ruling is not consistent with the historical purposes of the Establishment Clause. The statute insulates religious organizations from the regulatory machinery of the government in a limited area, employment of its own members in its activities. The Conference is concerned that, unless reversed, the district court's flawed Establishment Clause analysis will further derogate the meaning and interpretation of the Clause and lead to increased governmental involvement in the affairs of religious organizations.

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[1] In the last three terms, the Conference has appeared as *amicus curiae* in *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S.Ct. 2718 (1986); *Bender v. Williamsport Area School District*, 106 S.Ct. 1326 (1986); *Aguilar v. Felton*, 105 S.Ct. 3232 (1985); and *School District of Grand Rapids v. Ball*, 105 S.Ct. 3126 (1985). The Conference extensively briefed the history of the Establishment Clause in *Mueller v. Allen*, 463 U.S. 388 (1983), and participated as *amicus curiae* in *Walz v. Tax Commission*, 397 U.S. 664 (1970), largely examining the historical treatment accorded tax exemptions.

Through their counsel, the parties consent to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

This Court has correctly insisted that the Establishment Clause be construed "according to what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).[2] If routinely a part of judicial review, that construction would substantially advance reasoned decision-making, giving the Clause its "natural and intended meaning . . . not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). In reviewing allegations that the Establishment Clause has been infringed, a court must determine the precise nature of the challenged action and the degree to which the government is responsible for that action. A court should invalidate the challenged action only when it is convinced the government has taken action that is clearly incompatible with the purposes and intent of the Clause as revealed through history and experience. In this case, the district court seriously erred in its application and interpretation of the Clause. *Amos v. Corporation of the Presiding Bishop*, 594 F. Supp. 791 (D. Utah 1984), *on subsequent hearing*, 618 F. Supp. 1013 (D. Utah 1985), *jurisdiction postponed*, 107 S.Ct. 396 (1986) (Nos. 86-179, 86-401).

At issue in this case is the congressional judgment, embodied in a provision of a federal employment statute, that federal regulatory authority should not police religious organizations in the employment of their own members in their activities. Section 702 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-1 ("section

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[2] The Religion Clauses of the first amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

702"). The Church of Jesus Christ of Latter-Day Saints ("Church") requires that its employees be or become members in good standing. Here, employees who would not or could not were discharged, and subsequently sued the Church. The Church defended by interposing the exemption provided in section 702. The district court held the provision unconstitutional as to one of the employees, asserting that it "authoriz[ed] . . . conduct which can directly and immediately advance religious tenets and practices." 594 F. Supp. at 825. Thus, Congress was held to have authorized the discharge on discriminatory religious grounds in contravention of the Establishment Clause. This conclusion does not withstand scrutiny.

In section 702, Congress authorized or condoned nothing; it simply declined to regulate a matter plainly within its discretion. *See United States v. Petrillo*, 332 U.S. 1, 8 (1947). Whether private religious organizations take actions that are discriminatory or not depends entirely on choices made in specific factual situations, and not on any generalized governmental action. When the Church in this case favored its own members, resulting in the discharge of the plaintiff employee, its actions did not implicate any constitutional provision. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982). Congress's refusal to regulate a particular private transaction does not suddenly transform that private action into governmental action. *Flagg Brothers v. Brooks*, 436 U.S. 149, 164-165 (1978); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972). In the present case, the injury complained of (discharge) resulted from the purely private choice of a private employer. The statutory provision neither authorized nor compelled that result; its effect is simply not to penalize a private decision of a religious organization. Most certainly, this does not involve any violation of the Establishment Clause, as it is authentically construed.

History teaches that the Establishment Clause was intended to deny to the new federal government the power

to prefer any religion over others. The Clause buttresses the Free Exercise Clause protections for religious liberty by denying to the government a specific way in which religious freedom had historically been infringed by action of the government. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). Excessive state involvement in religious matters that tends to burden liberty impairs freedom of belief and practice. Such involvement is mitigated by the section 702 provision challenged here.

An absolutist approach to the Establishment Clause that would invalidate any statute through which a religious group may receive some benefit has been routinely rejected. *E.g., Lynch v. Donnelly*, 465 U.S. at 678. Instead, this Court scrutinizes the challenged action to determine whether, in fact, it tends to "establish" religion, as that term is precisely understood. *Id.* Looking at the statute as a whole, any advancement of religion from section 702 is incidental and indirect, resulting not from governmental action but rather from "genuinely independent and private choices." *Witters v. Washington Dep't of Services for the Blind*, —— U.S. ——, 106 S.Ct. 748, 752 (1986); *Mueller v. Allen*, 463 U.S. 388, 399, 400 (1983).

Moreover, in its Establishment Clause jurisprudence, this Court recognizes that the power to tax, like the power to regulate, can be an instrument of hostility toward religion. *E.g., Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). An exemption minimizes encroachment by the state and promotes the "desired separation and insulation of government from religion." *Id.* at 675. Rather than violate the values embodied in the Establishment Clause, section 702 mitigates that which history and experience reveal should be guarded against—excessive involvement by the state in religion. The contrary judgment of the district court should be reversed.

ARGUMENT

THE ESTABLISHMENT CLAUSE IS NOT VIOLATED UNLESS THE STATE, AND NOT A PRIVATE PARTY, ACTS CLEARLY INCOMPATIBLY WITH THE CLAUSE'S PURPOSES AND INTENT. A STATUTE DESIGNED TO AVOID INVOLVEMENT OF THE STATE IN RELIGIOUS MATTERS IS CONSISTENT WITH THE CLAUSE.

The Constitution acts as a guide for and a restraint upon those actions undertaken by the government. With rare exceptions,[3] the Constitution does not reach private actions undertaken for private reasons, actions that when done by the government would violate the Constitution. *Rendell-Baker v. Kohn*, 457 U.S. at 837. Since 1964, as a matter of national policy, Congress has regulated the conduct of certain activities to eliminate discrimination based on race, color, sex, national origin, and religion. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* However, Congress provided a number of provisions limiting the reach of its anti-discrimination law, including one which restricts the scope of regulatory authority over religious organizations in matters involving the employment of their members. In section 702, Congress avoided a policy that would compel religious groups to accept non-members in their activities. 42 U.S.C. § 2000e-1;[4] Joint Explanatory Statement of

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[3] One example of forbidden private action is the thirteenth amendment's prohibition on slavery. *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 438-39 (1968).

[4] Prior to 1972, the religious exemption in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-1 provided: "This subchapter shall not apply . . . to a religious corporation, association, [educational institution], or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, [educational institution], or society of its *religious* activities." Pub. L. No. 88-352, 78 Stat. 255, section 702 (1964). In 1972, the bracketed words were added, and the italicized word was deleted.

Conference Managers, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2179, 2180; 118 Cong. Rec. 4503 (1972) (remarks of Sen. Ervin).

Limiting federal regulation of religious organizations ensures that government will avoid certain involvements in religion. *Id.* Like tax exemptions, section 702, a regulatory exemption, promotes "the desired insulation and separation" of the state and religion. *See Walz v. Tax Commission*, 397 U.S. at 675. Contrary to the district court's ruling, the Establishment Clause does not demand regulatory involvement by the state in the affairs of religious groups.[5]

A. The Authentic Meaning of the Establishment Clause, Revealed by History and Experience, Is to Protect Religious Liberty by Denying to the State the Power to Prefer or Impermissibly Advance Religion.

As part of the Bill of Rights, the Establishment and Free Exercise Clauses were intended by the framers to be complementary and comprehensive protections for religious liberty. "[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." *Wisconsin v. Yoder*, 406 U.S. at 214. The Establishment Clause reflects the experience of its framers that officially preferred or established religion generates religious intolerance and infringes personal liberty. *E.g., School District*

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[5] The concern of the Conference in this case is in rectifying the erroneous construction of the Establishment Clause adopted by the district court. It takes no position on the facts underlying the dispute at issue here.

of Abington Township v. Schempp, 274 U.S. 203, 221-22 (1963); *Torcaso v. Watkins*, 376 U.S. at 490.[6]

Responding to the express wishes of five States in their resolutions of ratification,[7] in the First Congress, James Madison introduced this version of what became the Religion Clauses of the first amendment:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

As Madison explained, the "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Congress* 730 (Gales & Seaton eds. 1789).[8]

The legislative debates evidenced little, if any, disagreement with these objectives. The Religion Clauses

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[6] As discussed in *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961), the colonists often created "the formal or practical 'establishment' of particular faiths in most of the colonies, with consequent burdens imposed on the free exercise of the faiths of non-favored believers."

[7] New Hampshire, New York, North Carolina, Rhode Island and Virginia specifically addressed the issue of religious freedom in their ratifying acts. Four states (New Hampshire excepted) also addressed the issue of a prohibition against an established religion, in terms of preferring one religion over others. I Debates on the Adoption of the Federal Constitution 328 (2d ed. J. Elliott ed. 1836) (New York), *id.* 334 (Rhode Island), III *id.* 659 (Virginia), and IV *id.* 244 (North Carolina). However, many including Madison believed that religion was not the province of the new government and that the religious diversity of the new country made preference politically untenable. III *id.* 330. *See generally* 1 *Annals of Congress* 731 (Gales & Seaton eds. 1789).

[8] *See id.* at 432-36. Madison also recited a popular fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 730-31.

that emerged from this process, however, were a House-Senate compromise.[9] The language finally selected satisfied the major objectives of the recommending states, as noted by Madison (*Annals, supra* at 432-36, 731), but respected the concerns of his peers.[10] The phrase "respecting an establishment" had two purposes, first to prevent Congress from establishing or favoring a national religion, and second to prevent Congress from interfering with state policies with regard to religion.[11]

The Religion Clauses were designed to protect religious liberty both by prohibiting interference in personal religious beliefs (both Clauses), and by specifically assuring that no religion could gain the special favor of the government, thereby subverting others (Establishment Clause). L. Whipple, *Our Ancient Liberties*, 66-68 (Da Capo ed. 1972). A prohibition of laws infringing the free exercise of religion would have been enough to mandate tolerance. Tolerance, however, could have meant that, although all could worship in peace, some religion

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[9] The history of the debates and the legislative compromise is extensively set forth in the opinion of the Chief Justice in *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 2510-2512 (1985) (Rehnquist, J., dissenting), and in the Conference's brief *amicus curiae* in *Mueller v. Allen, supra* note 1, Amicus Br. at 6-14, 22-24.

[10] Some participants in the debate expressed concerns about whether the new government would be national or federal. *Wallace v. Jaffree*, 105 S.Ct. at 2511. Moreover, others feared that the new government might interfere with the autonomy of states in religious matters, no small matter to those that maintained "established" churches. *See* Corwin, *The Supreme Court as National School Board*, 14 Law & Contemp. Probs. 3, 10 (1949).

[11] *Annals, supra* note 7, at 730-31. It was no mere coincidence that the leading actors in the House debates (except Madison) were from states with some degree of established religion. In this regard, Stokes argued that "respecting an establishment" was intended to confine the new Congress's regulatory power over religion. I A. Stokes, *Church and State in the United States*, 539-40. Stoke's view, like that of the Conference, was that the Religion Clauses were intended to offer protection *for* religion, not to be used as a lever *against* religion. *Id.* at 556.

might still be preferred by the state. Hence, the framers also denied to the new government the power of preference (note 8, *supra*), and thereby required equal treatment of all religions. *Id.* at 72.

The drafting process reflected the framers' experience with the historical realities of "establishment." A little more than half a century later, the Senate Judiciary Committee adverted to that experience when it rejected a petition urging that provisions for legislative and military chaplains should be abolished as an "establishment of religion." In its Report in 1853, the Committee explained that the phrase " 'establishment of religion' . . . referred, without doubt, to that establishment which existed in the mother country." S. Rep. No. 376, 32d Cong., 1st Sess. 1 (1853). It meant:

> the connexion [sic] with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances.

Id. This description provides a strong summary and important interpretation of the historical church-state involvement which led to the Establishment Clause. It is strikingly parallel to the description of the purposes and intent of the Clause that appears in *Lynch v. Donnelly*, 465 U.S. at 687-88 (O'Connor, J., concurring) and in *Larkin v. Grendel's Den*, 459 U.S. 116, 126-127 (1982).

B. Section 702 Avoids Involvement of the State in Religious Matters. It Tolerates a Range of Private Action and Does Not Itself Prefer or Impermissibly Advance Religion.

Section 702 operates simply to restrict governmental regulation of religious organizations in a limited area involving the employment of their own mombers. In ex-

ercising regulatory authority over religious organizations, Congress drew the line at employment decisions made on the basis of religion. It did, however, cover employment decisions based on race, sex and other grounds. In drawing the line, Congress chose to minimize the area of potential conflict between church and state, and did so in a way that did not violate the Establishment Clause. *See* 118 Cong. Rec. 4503 (1972) (remarks of Sen. Ervin). Section 702 authorizes nothing; it simply expresses Congress's choice not to regulate in a particular area.

The district court perceived matters differently. It acknowledged that Congress's purpose was to avoid conflict with religion [12] but ignored the real effect of section 702. Instead, it adopted uncritical *dicta* from another case [13] and held that the exemption had the "primary effect" of impermissibility advancing religion. *Amos v. Corporation of the Presiding Bishop*, *supra*, 594 F. Supp. at 823-825.[14] The district court stated that Congress could not

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[12] The district court found the Congress's desire to avoid potential conflict with religious groups to be a valid "secular purpose." *Amos v. Corporation of the Presiding Bishop*, 594 F. Supp. 795, 821 (D. Utah 1984). *See* note 14 *infra*.

[13] *King's Garden v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). That case involved a challenge to an FCC license condition forbidding discrimination. The licensee contended that the FCC was bound to allow the exemption provided in section 702 of the Civil Rights Act. The court of appeals, through Judge Wright, summarily rejected the argument. Although the issue was not before the court, Judge Wright opined at length on the unconstitutionality of section 702, starting with the unsupported premise that Congress may not choose to limit the scope of its regulatory authority. 498 F.2d at 55 (*citing "Compare Reitman v. Mulkey*, 387 U.S. 369 (1967)"). *Reitman v. Mulkey* involved a state provision *intended* to authorize private discrimination. The district court in this case expressly found that, in enacting section 702, Congress intended to minimize regulatory conflicts with religious groups. *Supra* note 12.

[14] The district court chose to apply the three-part *Lemon v. Kurtzman* test for validity under the Establishment Clause. *See*

choose how to apply its regulatory authority. Once Congress chose to regulate, it must do so equally over the entire spectrum of businesses. *Id.* at 812, n.36, 821. Although there were no commercial competitors of the Church in the case, the court found the "effect" of section 702 "sponsored" religiously owned business activities over secular commercial rivals. *Id.* at 825.[15]

In summary, the court stated that, in effect, section 702 "authorize[d] . . . conduct which can directly and immediately advance religious tenets and practices." *Id.* In so concluding, the district court was analytically incorrect by insinuating the government into private conduct and misapplied this Court's rulings on the Establishment Clause.

1. *Section 702 Does Not Involve the Government in the Discharge Challenged Here. Without Action by the Government, There Is No Establishment Clause Violation.*

In this case, employees of Church-operated activities were discharged when they would not or could not become members in good standing. *Amos v. Corporation*

Larson v. Valente, 456 U.S. 228, 252 (1982). As stated in *Lemon v. Kurtzman*, the test is: "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one which neither advances nor inhibits religion; and third, the statute must not foster excessive entanglement with religion." 403 U.S. 602, 612-13 (1971). The Conference's continuing difficulties with the application of the *Lemon* test and the uncritical use of elements of the test, discussed in its briefs (*supra* note 1) in *Ohio Civil Rights Commission v. Dayton Christian Schools*, *Bender v. Williamsport* and *Aguilar v. Felton*, are manifestly illustrated by the district court decision in this case.

[15] It is extremely unlikely that the plaintiff employees would have standing to raise the prospect of competitive injury to secular industries from section 702. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). Thus, the district court's assertion of competitive harm as a "primary effect" of section 702 should be treated for what it is—plain error.

of the Presiding Bishop, 594 F. Supp. at 796. Focusing on one employee discharge, the district court treated that purely private action as if it were affirmatively authorized by Congress, in violation of the Establishment Clause. *Id.* at 812, 821, 824. *Fike v. United Methodist Children's Home*, 547 F. Supp. 286, 291 (E.D. Va. 1982), *aff'd*, 709 F.2d 284, 286 (4th Cir. 1983).

The Clause (as discussed above at pages 9-10) was intended to protect religious liberty against government encroachment. Section 702 does not threaten anyone's religious liberty through the action of the government. Although the district court asserted that the plaintiff employee's liberty not to be a member of the Church was infringed, any infringement occcurred, if at all, from actions of the religious group and not from actions of the Congress. Congress did not compel or authorize the Church to act in any particular way; it simply declined to penalize a range of choices made for purely private reasons. *Compare Estate of Thornton v. Caldor*, 472 U.S. 703, 105 S.Ct. 2914, 2917 (1985), *with* section 702, *supra*, note 4. Without some governmental action, there can be no constitutional violation.[16]

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[16] As discussed below in argument B.2, the only governmental action involved here was in passing section 702, a provision that simply declined to extend Congress's regulatory power into a limited area of activity. Congress has the authority to regulate or not as a matter of legislative discretion. Absent plain constitutional infirmity, a court may not second-guess the wisdom or scope of a permitted legislative choice. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 518, 556-57 (1978). This is particularly so in regulation of activities under the commerce clause. As stated in *United States v. Petrillo*, 332 U.S. 1, 8 (1947): "[I]t is not within our province to say that because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power." *See United States v. Rodgers*, 466 U.S. 475, 484 (1984); *Evans v. Abney*, 396 U.S. 435, 447 (1970). Thus, the court of appeals in *King's Garden v. FCC*, *supra* note 13, erred in asserting that Congress must regulate equally in all directions once it chooses to regulate in one.

An important analogy may be drawn to the decisions of this Court on what constitutes "state action," for the purposes of establishing a claim for relief under 42 U.S.C. § 1983. "State action" is found in otherwise private action only where the government has "exercised coercive power or provided significant encouragement, overt or covert." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The receipt of significant government funding and the existence of pervasive regulatory power are not enough to convert private action into state action for liability purposes. *Rendell-Baker v. Kohn*, 457 U.S. at 838, *Jackson v. Metropolitan Edison*, 419 U.S. 345, 351 357 (1974). Most importantly, when a statute merely tolerates a range of private actions, including the one complained of, and does not directly involve the state in the act itself, there is no "state action." *Flagg Brothers v. Brooks*, 436 U.S. at 164. *See Moose Lodge v. Irvis*, 407 U.S. at 173, 179.

In *Flagg Brothers*, one private party sued another under 42 U.S.C. § 1983 to protest a sale of warehoused goods permitted under the Uniform Commercial Code. This Court rejected the argument that, by passing the statute allowing the protested sale, the state was now responsible for the actions of the private party. A failure to prohibit certain acts does not amount to authorization or encouragement for those actions. 436 U.S. at 165.[17] The private choice by Flagg Brothers to sell the warehoused goods was permited but not compelled by the statute. *Id.* Simply by making a permitted choice, a private party does not insinuate the government into that activity, which then becomes subject to constitutional scrutiny. *Evans v. Abney*, 396 U.S. 435, 445-46 (1970); *see Moose Lodge v. Irvis*, 407 U.S. at 173, 179. The same conclu-

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[17] Indeed, the Court stated even "acquiescence" is not enough to convert private action into state action. *Flagg Brothers v. Brooks*, 436 U.S. 149, 164 (1978), *citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168, 170-71. (1970).

sion applies to choices permitted under a statutory exemption.

Section 702 does not in any way involve the government in making religious choices, much less discriminatory choices. What it does is render certain private choices not actionable under Title VII. The failure to preclude all forms of private discrimination and provide a federal remedy does not then convey the notion that the government endorses or encourages discrimination. *Evans v. Abney, supra.* In this case, the district court confused a refusal to regulate with authorization of purely private conduct. This Court should insist on direct government action, at a minimum, before the Establishment Clause is violated.

2. *Section 702 Does Not Impermissibly Prefer or Advance Religion in Violation of the Establishment Clause. It Insulates Religion from Certain Governmental Regulation.*

In *Lynch v. Donnelly*, the Court reaffirmed that the Establishment Clause should be interpreted "according to what history reveals was the contemporaneous understanding of its guarantees." 465 U.S. at 673. That history, recited above, reveals that the Clause was never intended to demand "hermetic separation." *Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976) (plurality). Merely because a statute arguably results in some advancement of religion does not mean it must automatically be invalidated. *Lynch v. Donnelly*, 465 U.S. at 678. Rather the legislation must be carefully scrutinized "to determine whether, *in reality*, it establishes a religion or religious faith, or tends to do so." *Id.* (emphasis added).

What the Court has forbidden is government "sponsorship, financial support, and active involvement" with religion. *Walz v. Tax Commission*, 397 U.S. at 668. What constitutes "sponsorship, support, or involvement" depends on the facts of a particular case. Moreover, there

is a "gray area" between the limits of the Establishment Clause and the commands of the Free Exercise Clause, what the Court has described as "*room for play in the joints* productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669 (emphasis added). Government may go further than that which is commanded by the Free Exercise Clause to accommodate religion without running afoul of the Establishment Clause. *Id.* at 673.[18] In this gray area, when the government only allows for independent religious choices, there is no invalidity under the Establishment Clause. *See Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting); *Sherbert v. Verner*, 374 U.S. 398, 422, 423 (1963) (Harlan, J., dissenting).

Section 702 plainly passes constitutional muster when the Establishment Clause is applied consistent with its historical purposes (discussed at pages 9-10, *supra*). It does not impermissibly prefer or advance any religion. A religious organization will simply not be penalized for choosing its own members in employment. The government is not involved in the employment decision. *Estate of Thornton v. Caldor*, *supra*. Simply because a statute may result in some advancement of religion *in a particular case* does not cause invalidity. Such a rule would defy "common sense and established precedent." *Witters v. Washington Dep't of Services for the Blind*, 106 S.Ct. at 754 (Powell, J., concurring). A court is required to decide whether, as a whole, the statute advances religion or simply allows private parties to make individual

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[18] That Congress may choose whether to include or exempt persons from a statute on religious grounds as an accommodation is well-established. *United States v. Lee*, 455 U.S. 252, 261 (1982); *Bowen v. Roy*, 106 S.Ct. 2147, 2158 (1986) (opinion of Burger, C.J.). That choice does not violate the Establishment Clause. *Id.*

choices for religious or other reasons. *Id.* at 752, 753; *Mueller v. Allen*, 463 U.S. at 397-400. Where advancement of religion occurs, not because of any governmentally authorized activity or sponsorship, but "only as a result of the genuinely independent and private choices . . .," there is no invalidity under the Establishment Clause. *Witters v. Washington Dep't of Services for the Blind*, 106 S.Ct. at 752.

Finally, section 702 shrinks the area of potential governmental conflict with religious groups, and is, therefore, within the range of actions permitted under this Court's decisions. The Court has recognized the power to tax historically had been and could be used to suppress religious activity. *Walz v. Tax Commission*, 397 U.S. at 673. For that reason, exemption from taxation was routinely provided for reliigous groups and would not, in any event, violate the Establishment Clause. *Id.*; *see Committee on Public Education, etc. v. Nyquist*, 413 U.S. 756, 793 (1973). Similarly, excessive regulation can have the same suppressive effect on private activity. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.). Provisions such as section 702 reduce this possibility.

Thus, the Court has taken great pains to avoid governmental regulation of religious organizations unless clearly required by statute. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501, 504 (1979). Here Congress clearly and unambiguously provided that Title VII shall not apply to certain limited actions of religious organizations. Although an exemption may indirectly benefit religion in that it allows for unregulated private choices, section 702 in no way provides any purposeful illegal subsidy or support. *See Committee on Public Education v. Nyquist, supra.* On the other hand, the narrow interpretation of section 702 adopted by the district court would lead to enlarged government involvement in re-

ligion, a result inconsistent with the Establishment Clause. *Id.*; *Walz v. Tax Commission*, 397 U.S. at 675-76. An exemption minimizes involvement and promotes "the desired insulation and separation." *Id.* at 675.

Section 702 provides, at most, only an indirect benefit to religion. Any arguable "advancement" from the provision occurs when a religious organization chooses to favor one of its members in employment. Narrowing section 702, as the district court did, necessarily involves the state in determining what are the religious activities of religious organizations. This approach ignores the express congressional intent to minimize government involvement in religious matters, an intent wholly consistent with the barriers intended by the Establishment Clause for the preservation of religious liberty. As written by Congress, section 702 does not pose the same threat to the authentic purposes of the Clause as the district court's interpretation. That interpretation should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-179 and 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and THE UNITED STATES OF AMERICA,

Appellants,

v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a civil rights organization which is national in membership. One of the League's central concerns is religious liberty. In pursuing this interest the League has often consulted with employees suffering religious discrimination, initiated litigation on behalf of these employees, and filed amicus curiae briefs with this Court urging expansive protection of religious freedom in employment. *See Ansonia*

Board of Education v. Philbrook, 55 U.S.L.W. 4019 (U.S. November 17, 1986); *Goldman v. Weinberger*, 106 S.Ct. 1310 (1986). Although the League is concerned about discrimination in employment, it is also concerned about the possible infringement upon the religious freedom of religious institutions which may accompany the application of discrimination laws to religiously oriented employers. For example, the League recently filed an amicus curiae brief with this Court arguing that application of a state employment discrimination statute to a religious oriented employer could cause religion clause problems. *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986). Finally, the League is very concerned with the type of expansive judicial interpretion of the Establishment Clause which is found in the instant case. The League has filed amicus curiae briefs with this Court in the past urging against such broad construction of the Establishment Clause. *See Edwards v. Aguillard* (No. 85-1513); *Aguilar v. Felton*, 105 S.Ct. 3232 (1985). The League's brief in this matter implements the League's varied interests in this area by urging that the Establishment Clause does not prohibit Congress from simultaneously enacting legislation protecting against religious discrimination in employment and allowing religious organization employers freedom from the coercive reach of such legislation.

SUMMARY OF ARGUMENT

Federal judicial review of congressional legislation under the religion clauses presents unique problems when the legislation itself is designed to avoid religion clause difficulties. The district court's decision illustrates some of the problems which result when the tripartite Establishment Clause test established by this Court in *Lemon v. Kurtzmann*, 403 U.S. 602 (1971), is applied to this type of legislation. In light of this Court's "unwillingness to be confined to any single test or criterion in this sensitive area," *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984), it would be wise for this Court to adopt a test in this case which would provide appropriate deference

to Congress' constitutional interpretations made in the course of the exercise of its assigned constitutional duties, *see United States v. Nixon*, 418 U.S. 683, 703 (1974), and which would take into account Congress' desire to avoid constitutional problems. *See NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979). Adopting such a test would avoid many of the problems which confronted the district court and would almost certainly result in a conclusion recognizing the constitutionality of the involved congressional legislation.

However, a proper application of the *Lemon* test's "primary effect" component would also result in a decision upholding the statute's constitutionality. The district court's "primary effect" construction was affected by four interrelated but relatively distinct difficulties: 1) the district court's failure to determine the legislation's religious effect by comparison to a case in which no governmental action occurred; 2) the district court's omission from its analysis of the religious advancement which results from religious discrimination statutes; 3) the district court's relatively unprecedented finding of governmental sponsorship of religion in a governmental determination to leave religious institutions free from specific types of coercive regulation; and 4) the district court's improper use of tests derived from judicial review of legislation under the religion clauses as a significant guide for determining the extent of congressional authority to legislate to avoid religion clause difficulties and the degree of deference a court should accord such congressional actions.

The district court approached this case by characterizing the involved statute as an exemption and special privilege for religious institutions. *See Amos v. Corporation of the Presiding Bishop*, 594 F. Supp. 791, 812-826 (D. Utah 1984), *juris. postponed*, 55 U.S.L. W. 3315 (U.S. November 3, 1986) (86-179, 86-401). In analyzing the case in this fashion the district court created a strong presumption that the statute was unconstitutional. In so doing the district court proved the truth of this Court's observation that "[f] ocus exclusively on the religious component of any activity [will] inevitably

lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. The congressional action involved in this case provided religious institutions with no privilege beyond that which they would have enjoyed in the absence of regulation. The case appears analogous to cases in which this Court has held the Equal Protection Clause not to be violated by the repeal of civil rights legislation which a government was never required to enact.

As well as failing to compare the government action to non-regulation, the district court failed to balance the religious effect of the exemption upon religious institutions against the limits the exemption placed on protection of individual religious exercise in employment. A proper consideration of the legislation's effect on individual religious exercise, as well as its effect upon religious institutions, would reveal that any "advancement" of religion that can be held involved in government's failure to coercively regulate religious insitutions' discrimination in employment is balanced by Congress' failure to advance the individual religious beliefs of employees in these cases. Had the district court considered the overall effect of the legislation it would have been difficult for it to conclude that the involved exemption had the primary effect of advancing religion.

The problems in the district court's analysis were further compounded by its relatively unprecedented characterization of congressional refusal to subject religious institutions to coercive regulation as advancement of religion. This case does not resemble the transfer of financially tangible resources to religious institutions arguably involved in either governmental financial aid, tax deduction or tax exemption legislation. Because religious institutions remain in virtually the same position as if they had never been regulated, the case does not resemble cases in which desirable non-economic privileges have been improperly accorded religious institutions or believers. In addition, the district court's position that the exemption for religious institutions is improper because it facilitates the extension of economic influence by religious institutions lacks solid grounding in the Establish-

ment Clause. Finally, an exemption from religious discrimination legislation does not provide religious institution employers with an improper preference over other employers because the ability to engage in religious discrimination is not a universally valuable economic right, even if it is valuable to religious institutions for non-economic reasons. Thus, the congressional exemption from religious discrimination legislation may be analogized to Justice Stevens' characterizations of this Court's Free Exercise decisions in *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring): governmental action which does not provide religious believers with preferences which others might desire, but merely redresses unique difficulties the religious believer suffers in a particular situation because of his religious beliefs.

The district court's analysis also improperly utilized tests derived from judicial review of legislation for compliance with religion clause concerns over excessive entanglement and free exercise as guides for determining the vastly different questions of Congress' ability to design legislation to address these religion clause concerns and the degree of deference a court should accord such legislation. Use of these judicial tests presents problems for several reasons. Initially, these tests generally incorporate a high degree of deference to legislative judgements and, thus, have built into them the assumption that the legislative body can act in a fashion which would provide greater protection to the religion clause values at stake if it so desires. In the excessive entanglement area, use of the judicial test as a guide to Congress' ability to enact this legislation appears at odds with *NLRB v. Catholic Bishop*, 440 U.S. 490, 500-507 (1979), in which this Court did not determine whether a congressional decision to refrain from coercively regulating a religiously oriented employer violated the Establishment Clause by doing more than what would be required of a court by judicial tests under the religion clause. In the free exercise area, use of judicial tests proves inappropriate because courts, in cases presenting only one religious institution's concerns, cannot address the vast

array of free exercise concerns which could motivate a legislative exemption. Such a test also proves an ineffective measure of legislative authority to regulate in this area because Congress' decision not to regulate reveals its determination that there does not exist a governmental interest in preventing discrimination sufficient to outweigh the effect upon free exercise values. Thus, a court in these cases will never be able to say with authority that a governmental interest overcomes free exercise concerns.

ARGUMENT

I. DIFFUCULTIES IN APPLYING THE *LEMON* TEST TO A CASE IN WHICH CONGRESS ACTS TO AVOID RELIGION CLAUSE PROBLEMS MAY CALL FOR UTILIZATION OF A DIFFERENT ESTABLISHMENT CLAUSE ANALYSIS SPECIFICALLY TAILORED TO THIS SITUATION.

The district court's decisions reveal the problems which result when a court attempts to apply the tripartite Establishment Clause test established by this Court in *Lemon v. Kurtzmann*, 403 U.S. 602 (1971), in a case in which Congress has refrained from regulating certain conduct to avoid possible religion clause difficulties. Indeed, the fact that the district court could find an Establishment Clause violation in a statutory framework designed with the specific intent of avoiding religion clause problems points toward the unsuitability of the *Lemon* test as a guide for determining conformity to the Establishment Clause in this matter.

This Court has never held the *Lemon* test to be the only suitable method for determining conformity to Establishment Clause requirments. Instead, the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). In light of this fact, the Court should apply a test in this case which would provide appropriate deference to Congress' constitutional interpretations made in

the course of the exercise of its assigned constitutional duties,[1] and which would take into account Congress' desire to avoid constitutional problems. *See NLRB v. Catholic Bishop,* 440 U.S. 490, 500 (1979). Certainly, any test applied in this case, even the *Lemon* test, should provide Congress with the flexibility it needs to address the complicated matter of regulating religious institutions' alleged religiously discriminatory employment decisions. Unfortunately, the district court paid lip service to congressional regulatory flexibility in this area, and then applied an Establishment Clause test which allowed Congress little more flexibility than a court would be permitted in invalidating congressional enactments on constitutional grounds. *See Amos v. Corporation of the Presiding Bishop,* 594 F. Supp. 791, 813, 814-826 (D. Utah 1984), *juris. postponed,* 55 U.S.L.W. 3315 (U.S. November 3, 1986) (86-179, 86-401). Should this Court apply a test which would allow Congress the freedom necessary to properly carry out its goal of regulating religious institutions' employment decisions in a manner which avoids religion clause problems, it would be almost certain that the statute involved in this case would be held constitutional. As will be seen, however, even under the *Lemon* test the statute should have been held constitutional.

II. THE DISTRICT COURT IMPROPERLY CONSTRUED THE "PRIMARY EFFECT" PRONG OF THE *LEMON* TEST IN ITS APPLICATION OF THAT TEST TO CONGRESS' DECISION NOT TO COVERCIVELY REGULATE RELIGIOUS DISCRIMINATION IN THE EMPLOYMENT DECISIONS OF RELIGIOUS INSTITUTIONS.

The district court specifically concluded that Congress enacted the statute at issue in this case to achieve the secular purpose of avoiding religion clause problems. *See* 594 F. Supp. at 805-812. Ironically, the court then concluded that Congress' very efforts to avoid religion clause difficulties vio-

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[1] *See United States v. Nixon,* 418 U.S. 683, 703 (1974).

lated the Establishment Clause since they had the "primary effect" of advancing religion. *See id.* at 812-826. The district court's disposition requires the conclusion either that Congress totally lacked the simple ability to design a statute to achieve its professed purposes or that the district court misapplied the *Lemon* test's "primary effect" component in reaching its decision. Amicus respectfully submits that the latter conclusion is correct.

The district court's "primary effect" analysis exhibits a number of shortcomings. While each of these defects is interrelated, it is possible to isolate at least four relatively distinct problems. These difficulties are 1) the district court's failure to determine the legislation's religious effect by comparison to a case in which no governmental action occurred; 2) the district court's omission from its analysis of the religious advancement which results from religious discrimination statutes; 3) the district court's relatively unprecedented finding of governmental sponsorship of religion in a governmental determination to leave religious institutions free from specific types of coercive regulation; and 4) the district court's improper use of tests derived from judicial review of legislation under the religion clauses as a significant guide for determining the extent of congressional authority to legislate to avoid religion clause difficulties and the degree of deference a court should accord such congressional actions. All of these problems contribute to the necessary conclusion that the district court erred when it determined that Congress' decision to exempt religious institutions from religious employment discrimination legislation had the primary effect of advancing religion.

A. The Primary Effect of Legislation Should be Detemined by Comparison to Cases in which No Governmental Action Has Occurred.

The district court approached this case by characterizing the involved statute as an exemption and special privilege for religious institutions. *See* 594 F. Supp. at 812-826. In analyzing the case in this fashion the district court created

a strong presumption that the statute was unconstitutional. In so doing the district court proved the truth of this Court's observation that "[f] ocus exclusively on the religious component of any activity [will] inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. If the district court had considered the statute in light of the situation which would exist if Congress had enacted no religious discrimination legislation, it would have been hard pressed to find any advancement of religion in this statute. The court certainly would have been unable to find the direct, immediate or substantial effect of advancing or inhibiting religion which it conceded was necessary for a finding of violation of the "primary effect" prong of the *Lemon* test. *See* 594 F. Supp. at 820.

When Congress chose not to regulate religiously discriminatory employment decisions of religious institutions, it simply left these institutions in the same position as if they had never been regulated. No privilege was provided these institutions beyond that which they would enjoy in the absence of governmental regulation. The district court's determination that the governmental decision not to interfere with religious institutions had the primary effect of advancing religion clearly appears to have resulted from the district court's excessive focus on the religious component of the decision's overall effect.

The district court seemed aware of the flaws in its analysis and responded with dictum from *King's Garden, Inc. v. FCC*, 498 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974) to the effect that if Congress decides to regulate in an area in which it is not required to regulate, it may not choose to refrain from also regulating religious organizations. *See* 594 F.Supp. at 821. However, this reasoning would mandate the strange result that Congress could only avoid the significant religion clause problems involved in regulating religious discrimination in the employment decisions of religious institutions by refusing to provide any employees with protection from religious discrimination in employment. This sort of absurd result illustrates why "[i] n our modern, com-

plex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Lynch*, 465 U.S. at 678.

Cases in an analogous areas support the proposition that government does not violate the Establishment Clause when it repeals religious discrimination protection it was never required to enact. This Court has clearly held that the Equal Protection Clause of the Constitution is not violated when a legislature repeals discrimination legislation it was not required to enact, if the repeal does not have a distorting effect upon governmental institutions (e.g., a state repealing local action) and does not specifically encourage discrimination. *Compare Crawford v. Board of Education*, 458 U.S. 527 (1982) (State may choose not to require mandatory bussing beyond federal constitutional standards, although it had previously required such bussing) *with Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (State electorate may not modify local school district's independent decisions on bussing because of distorting effect on political process). It would seem odd to hold that the Establishment Clause forbids a government from repealing a portion of its religious discrimination protection, when previous federal constitutional decisions have recognized that the important policy of encouraging legislation remedying discrimination must allow governments flexibility to enact discrimination legislation unrequired by the federal constitution without fear that they will violate the constitution if they choose to repeal such legislation. *See Crawford*, 458 U.S.at 539-540.

The district court's refusal to come to grips with the fact that the exemption placed religion in no better position than it would have been in the absence of governmental regulation clearly was a factor in its erroneous conclusion that the involved statute had the primary effect of advancing religion.

B. A Complete Primary Effect Analysis Requires Consideration of the Religious Advancement which Results from Statutes Forbidding Religious Discrimination in Employment.

Not only did the district court fail to compare religious institutions' position under the statutory exemption to the position they would have enjoyed in the absense of regulation, it also failed to consider the religious advancement which results from the enactment of employment discriminatin statutes. In this way the district court failed to heed this Court's warning in *Lynch* against excessive concentration upon particular religious effects of governmental actions and focussed only upon the one religious aspect of the statute which it deemed significant. The result was a further skewing of the district court's Establishment Clause analysis.

This Court has clearly indicated that religious discrimination statutes have the potential to advance religion in some fashion by aiding individual religious exercise. *See Estate of Thornton v. Caldor, Inc.* 105 S.Ct. 2914, 2917-2918 (1985). In fact, the religious discrimination statute at issue in that case was held to provide too much aid to a particular type of religious exercise and, thus, to have the primary effect of advancing religion. *Id.* While a concurring opinion in *Thornton* correctly stated that the federal religious discrimination statute at issue in this case has a secular primary effect because it provides a reasonable rather than an absolute accommodation of all rather than some religious beliefs,[2] it cannot be disputed that any religious discrimination statute provides some aid to religious exercise.

In light of this fact the district court's religion clause analysis should have focused on two sides of a religious effect equation instead of only one. On one side of the equation the analysis would recognize that Congress permissibly aided individual religious observance through religious discrimination statutes, but did not aid this individual religious ob-

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[2] *Id.* at 2919 (O'Connor, J., concurring).

servance in the few cases when the individual is employed by a religious institution which represents the religious concerns of its adherents. On the other side of the equation the analysis would recognize that any "advancement" of religion that can be held involved in the government's failure to coercively regulate religious institutions' religious discrimination in employment is balanced by Congress' failure to advance the individual religious beliefs of employees in these cases. Had the district court adequately considered this appropriate legislature balancing process, instead of focussing solely on the effect upon religious institutions, it would have been nearly impossible for it to simplistically conclude that the outcome of this legislative balancing process had the primary effect of advancing religion. However, as it now stands, the district court has virtually decreed that the Constitution inflexibly mandates the advancement of individual religious beliefs to the extent currently called for by Title VII in the case of a religious institution employer, while providing Congress only the latitude of the court's judicially created test in striking the balance between employee religious interests and those represented by religious institution employers. It is hard to believe that the flexible judicial approach to the Establishment Clause mandated by this Court's decisions would reach a result which so closely resembles judicial legislation. *See Lynch*, 465 U.S. at 678-679 ("In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed. The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause 'was to state an objective, not to write a statute.'"(citation omitted)).

C. Congress' Refusal to Subject Religious Institutions to Coercive Regulation Cannot Properly be Characterized as Sponsorship of Religion.

Closely related to the district court's failure to measure the effect of the governmental action in this case upon religious institutions by comparison to the absence of governmental action is the district court's improper characterization

of a government decision not to regulate religious institutions as sponsorship of religion. This relatively unprecedented finding perhaps can be attributed to the fact that the district court focussed nearly exclusively on how the governmental action affected religious institutions in place of a balanced examination of how the statute affected both institutions and individual believers.

The only cases of which amicus is aware that find a failure of government to coercively regulate religion to have the primary effect of advancing religion are those which have considered either in holding or dictum the constitutional validity of the statute in this case. *See Amos, King's Garden.* The absence of precedent in other areas to support the district court's position can be easily explained by a simple examination of the vast difference between the governmental actions which this Court has found to have the primary effect of advancing religion and the governmental refusal to coercively regulate certain behavior of religious institutions found in this case.

Governmental action has been most clearly held to have the primary effect of advancing religion when tangible economic aid is furnished to religious institutions. *See, e.g., Grand Rapids School District v. Ball,* 105 S.Ct. 3216 (1985). Certainly, a governmental refusal to coercively regulate a religious insitution does not constitute the diversion of public funds contributed by all to a religious entity arguably involved in those cases. Likewise, some potential effect of advancing religion might be found in preferential tax exemptions or deductions for religious institutions, although the effect of such legislation often is not enough to violate the Establishment Clause. *See, e.g., Mueller v. Allen,* 463 U.S. 388 (1983); *Walz v. Tax Commission,* 397 U.S. 664 (1970). The clear economic benefit of a reduced tax burden for religion and a conversely increased tax burden for others involved in such a case can be at least arguably seen as a tangible economic benefit to religion and a subject of potential concern under the Establishment Clause. Such a specific economic benefit, which would be desired by all and which may

work an economic detriment on non-religious entities, vastly differs from a government refusal to coercively regulate religious discrimination which would not necessarily be desired by all and which has no real effect upon any other entity's regulatory burden.

This case also bears little resemblance to the non-economic forms of governmental action which previously have been found to have the primary effect of advancing religion. Because the statute merely leaves religious institutions in the same position which they would have enjoyed in the absence of regulation, it does not resemble the special privileges granted religious institutions by the "veto" accorded religious institutions in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), or the special privileges granted certain religious believers by the sabbatarian employment discrimination statute in *Estate of Thornton.* Indeed, the fact that religious institutions are simply in the same position as they would be in the absence of regulation means that they are granted even less of a governmental benefit than the individual believer receives under the almost certainly constitutional "reasonable accommodation" of religion provisions found elsewhere in Title VII. 42 U.S.C. 2000e(j) and 2000e2(a)(1). It is indeed difficult to ascertain how an advancement of religion of the type previously proscribed by this Court has resulted from the governmental action (or more properly inaction) found in this case.

In the face of the virtual absence of precedent or reasoning supportive of its findings that the governmental action involved in this case had the primary effect of advancing religion, the district court turned to language from *King's Garden* to the effect that this exemption constituted governmental sponsorship of religion since it would facilitate the extension of religious influence in the secular economy. *See* 594 F. Supp. at 825. A careful consideration of this position demonstrates its unsuitability as a basis for an Establishment Clause violation. A governmental decision not to regulate certain affairs of a religious entity does not constitute a benefit to the religious institution. The institution is merely

in the same position as it would have been if government had not entered this regulatory area. The values of religious liberty which underlie the religion clauses certainly do not call for a holding that government must regulate religious institutions in ways which would make it more difficult for them to participate in economic affairs. Yet, that is what the district court's concept of governmental sponsorship would seemingly require.

The district court also appeared to rely on the position that the statute provided religious institutions with a regulatory preference over non-religious groups. While such a position might make sense if the involved regulations provided the religious institution a tangible benefit which would also be desired by other entities, it is highly questionable whether the exemption from religious discrimination statutes is of value to other entities. Religious discrimination statutes are seemingly founded in part upon the premise that private and public economic interests are served by anti-discrimination statutes which ensure that personnel decisions will be made upon proper economic grounds. *See Jurisdictional Statement of the United States,* at 15 n.10. If this is true, an employer ordinarily will be more prosperous if its personnel decisions are made on the basis of relative pertinent qualifications rather than on discriminatory grounds. In addition, under Title VII an employer is only required to suffer *de minimis* costs in accommodating an employee's religious beliefs. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84 (1977). Hence the ability to engage in religious discrimination, while possibly important to certain religious institution employers for non-economic reasons, is normally of little value to the non-religious institution employer. Accordingly, Congress, in the exercise of its legislative judgement, did not provide a preferential benefit to religious institutions by allowing religious institutions the exclusive ability to engage in behavior

which would be considered beneficial by other employers.[3] Congress' action is essentially analogous to Justice Stevens' characterizations of this Court's Free Exercise clause accommodation decisions: governmental action which does not provide religious believers with preferences which others might desire, but merely redresses unique difficulties the religious believer suffers in a particular situation because of his religious beliefs. *See United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

As can be seen, the district court's decision was further flawed because it found that a simple governmental refusal to coercively regulate a religious institution had the primary effect of advancing religion.

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[3] It is possible to conceive of some employers other than religious institutions who might appreciate the opportunity to make employment decisions on religious bases. For example, a fervent adherent to a particular religion might prefer to employ others who belong to his religion. However, Congress could properly exercise its legislative judgement in a fashion which would balance the various religious interests involved by preferring the free religious exercise of the individual employee to that of an individual employer but preferring the free religious exercise of a group of religious adherents (the religious institution employer) to that of an individual employee. Such a careful legislative judgement would not constitute an invalid preference of certain religious beliefs because institutional and individual religious beliefs are of many varied types and, more importantly, any regulatory scheme Congress could enact or refrain from enacting would inevitably prefer certain entities' religious preferences over others. For example, the regulation of institutions' employment discrimination desired by the district court would result in a preference for individual employee religious beliefs over those of both individual employers and religious institution employers.

D. Tests Derived from Judicial Review of Legislation under the Religion Clauses are Not Pertinent Guides for Determining the Extent of Congressional Authority to Legislate to Avoid Religion Clause Problems and the Appropriate Measure of Judicial Deference to Such Legislation.

The district court aggravated the difficulties resulting from its improper construction of the primary effect prong of the *Lemon* test by utilizing tests derived from judicial review of legislation for compliance with religion clause concerns over excessive entanglement and free exercise as guides for determining the vastly different questions of Congress' ability to design legislation to address these religion clause concerns and the degree of deference a court should accord such legislation.

As even the district court recognized, Congress' ability to accommodate religious belief is not co-extensive with the scope of noninterference with religion mandated by the Free Exercise Clause. *See* 594 F. Supp. at 813. However, the district court then proceeded to warn that "Congress must exercise a great deal of caution in drawing the boundaries of accommodation." *Id.* It followed this warning by applying judicial tests of entanglement and free exercise as significant guides in determining the proper scope of Congress' ability to regulate to avoid religion clause problems and the degree of deference it would accord such congressional actions. If the involved legislation was co-extensive with the judicial test the district court would probably have concluded that the action was a valid congressional attempt to implement the religion clauses. However, because the district court found the legislation to be more than what was required by judicial tests under the religion clauses, it subjected the legislation to fairly exacting Establishment Clause scrutiny. In utilizing this type of analysis the district court blurred the significant distinctions between judicial and legislature roles in upholding the religion clauses and improperly confined congressional regulatory flexibility in this important area.

Initially, it is important to recognize that tests utilized by federal courts in passing upon the constitutional validity of legislation are designed for a different purpose than is involved in the enactment of legislation. These tests will generally incorporate a high degree of deference to legislative judgements. For example, free exercise of religion can be adversely affected in situations which would not require a judicial exemption from generally applicable legislation. Thus in *Bowen v. Roy*, 106 S.Ct. 2147, 2158 n.19 (1986) (plurality opinion), it was indicated that Congress was free to legislate in ways which would protect free exercise of religion in a stronger fashion than a court would have been required to mandate. Similarly, a degree of entanglement may exist in particular governmental action which Congress could choose to avoid even though the entanglement would not be sufficiently excessive to require a court to invalidate the involved governmental action. What a court would be required to do, thus, has little relevance to the degree to which Congress may act to advance religion clause interests and avoid religion clause problems.

A closer examination of the district court's discussion of both entanglement and free exercise further illustrates the impropriety of its extensive use of judicial tests as a guide to determining the permissible scope of congressional action implementing the religion clauses and the extent of judicial deference to such action. Looking first at the entanglement area, the most instructive precedent is *NLRB v. Catholic Bishop*, 440 U.S. 490, 500-507 (1979). In that case this Court inferred a congressional intent not to regulate religious schools under the National Labor Relations Act because such regulation would have presented serious religion clause questions. One of the problems which could have resulted from such regulation was excessive entanglement of government in the affairs of an essentially religious institution. *See id.* at 501-504. In the instant case Congress has explicitly stated the desire not to regulate religious institutions which was only implicit in *Catholic Bishop*. The key point, however, is that the Court in *Catholic Bishop* nowhere determined

whether a court would have been constitutionally bound to exempt religious schools from regulation or even the more basic question of whether this legislative exemption violates the Establishment Clause. It is significant that the Court did not feel it necessary to address these issues because the dissenting opinion in *Catholic Bishop* contended that the involved legislative exemption would raise an Establishment Clause question. 440 U.S. at 518 n.11 (Brennan, J., dissenting). Accordingly, an important precedent exists for the proposition that a legislative body's determination to refrain from coercively regulating religious institutions will not be reviewed by a court under the Establishment Clause on the basis that the legislative body went beyond what would be required of a court by judicial tests under the religion clauses.

The district court's use of a judicial test as a guide for determining Congress' ability to accommodate free exercise concerns presents additional difficulties. Initially, the district court appeared to invalidate the generally applicable legislation in this case on the basis that the particular religious institution involved here apparently presented no significant free exercise claim for the religious discrimination it desired to engage in. *See* 594 F. Supp. at 817-820. This fact highlights a problem with utilization of a judicial test as a guide for determining legislative latitude in this area. A legislature must consider all parties covered by legislation, while a court must only consider the parties actually before it. Accordingly, a court will be unable to determine all the possible free exercise concerns which could be addressed by a statute such as that involved in this case. Thus, a judicial test under the free exercise clause is of little use as a guide for determining the vastly different question of legislative authority to address free exercise concerns.

Just as importantly, the governmental interest analysis under the judicial free exercise test will prove very difficult to apply as a guide in determining the scope of a legislature's ability to avoid possible free exercise clause problems. In a case such as this Congress has made a determination that there does not exist a governmental interest adequate to out-

weigh the free exercise interests which would be affected by governmental regulation. This means that free exercise will, by definition, not be overridden by a countervailing governmental interest in a case in which Congress has chosen not to regulate. In its analysis the district court emphasized that Congress' interests in eliminating religious discrimination were very strong and would have been sufficient under the judicial test to override any free exercise interests of religious institutions. *See* 594 F. Supp. at 819-820. However, if Congress has chosen not to regulate religious institutions, has it not by its own action determined that it does not have an interest in eliminating religious discrimination which would outweigh the involved free exercise interests?

This brief discussion illustrates some of the problems which result from the district court's utilization of judicial tests as a guide for determining Congress' ability to act to avoid religion clause difficulties, and judicial deference to such actions. Amicus urges this Court to adopt an analysis which will more properly recognize the unique needs of Congress for flexibility in acting legislatively to avoid religion clause difficulties.

CONCLUSION

In light of the problems with the district court's analysis highlighted above, the decision of the district court should be reversed.

Respectfully submitted,

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JANUARY 5, 1987

Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-179 and No. 86-401

In The

Supreme Court of the United States

October Term, 1986

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Appellants,

UNITED STATES OF AMERICA,
Intervenor,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS AND INTERVENOR

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In accordance with this Court's Rule 36, the General Conference of Seventh-day Adventists respectfully submits this Brief as Amicus Curiae in support of the Briefs

*Letters from all parties consenting to the participation of the General Conference of Seventh-day Adventists as amicus curiae have previously been filed with the Clerk of this Court.

on the Merits filed by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints in Case No. 86-179 and by the United States of America in Case No. 86-401.

INTEREST OF AMICUS CURIAE

The General Conference of Seventh-day Adventists is located in Washington, D.C. and is the governing body of the World-Wide Seventh-day Adventist Church. The Seventh-day Adventist Church currently has approximately five million members. The mission of the Seventh-day Adventist Church is carried on through a variety of means including educational, publishing and health care institutions. The Seventh-day Adventist Church, along with other religious organizations, has a keen interest in the outcome of *Amos* since an adverse ruling or a ruling narrowing the rights granted by Congress and guaranteed by the First Amendment to the United States Constitution would have an immediate and devastating impact on the activities associated with the mission of the Church.

SUMMARY OF ARGUMENT

When initially enacted, the prohibition against discrimination on the basis of religion in the Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e, *et seq.*, ("Title VII"), did not apply to "religious activities" of religious organizations. After eight years of experience with that exemption in Title VII, Congress amended the exemption to avoid the difficulties inherent in attempting to distinguish between the religious and secular activities of religious organizations. Affirming the decision of the

Amos court below would, in effect, constitute a repeal of the 1972 amendment and would result in serious entanglement problems both in the judicial and executive branches of government.

ARGUMENT

By enacting Title VII, Congress chose to exercise its authority to prohibit discrimination by private employers. This case comes before the Court because Congress chose not to exercise that authority as broadly as Appellees wish it had and Appellees were able to convince the court below that the Constitution requires the broader exercise. Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin. Section 702 of the Civil Rights Act of 1964, formerly codified at 42 U.S.C. Section 2000e-1, provided that the prohibition against discrimination would not apply to "the employment of individuals of a particular religion to perform work connected with the carrying on" by the religious organization "of its *religious* activities." ("1964 Exemption") (emphasis added).

After eight years of experience with the 1964 Exemption, Congress recognized the difficulties inherent in attempting to distinguish between the religious and secular activities of a religious organization. In 1972, Congress eliminated the religious/secular distinction by amending Section 702 to provide that the prohibition against discrimination would not apply to "the employment of individuals of a particular religion to perform work connected with the carrying on" by the religious organization "of its activities." ("1972 Exemption"). By removing

the word "religious" which preceded the word "activities," Congress extended the exempt status to all activities of religious organizations. The legislative history leading up to the 1972 Exemption makes it clear that Congress intended to avoid the distinction between secular and religious activities of a religious organization which existed under the 1964 Exemption. In discussing the 1964 Exemption, Senator Ervin stated:

> Mr. President, as I construe those words, they attempt to do an impossible thing, that is, to separate the religious activities of a religious corporation, association, educational institution, or society, from those of its activities which can be said to be not religious, non-religious, or unreligious. . . . This is so because the whole religious organization is one body, and yet the bill would attempt to divorce the two kinds of activities, each from the other and give a federal agency the power to dictate, or at least ultimately control, the employment practices of religious corporations, religious associations, religious educational institutions and religious societies from each other.

118 Cong. Rec. at 1973 (1972). Mr. Ervin two years earlier had argued for passage of a similar amendment which would eliminate the distinction between religious jobs and secular jobs:

> Mr. President, under [the 1964 Exemption], if a religious educational institution wanted to employ a professor of mathematics it could be compelled by the Commission to employ an infidel as professor of mathematics. . . . Apart from that, as a matter of policy, I think people who establish a religious institution and people who establish a church should be allowed to select a janitor or a secretary who is a member of the church in preference to some infidel or non-member. However, they could not do that

> under [the 1964 Exemption]. My amendment would exempt religious organizations from the control of the State.

116 Cong. Rec. at 34,565 (1970). Furthermore, Congress was aware and fully intended that the activities of religious organizations, as included in the 1972 Exemption, covered secular jobs as well as religious jobs:

> Many of these religious corporations and associations often provide purely secular services to the general public without regard to religious affiliation, and most of the many thousands of persons employed by these institutions perform totally secular functions. In this regard, employees in these "religious" institutions perform jobs that are identical to jobs in comparable secular institutions.

118 Cong. Rec. at 4813 (1972) (remarks by Senator Williams). Congress, by its 1972 Exemption, intended to prevent excessive government entanglement in the area of employment decisions made by religious organizations based on religious considerations. In the 1972 Exemption, Congress eliminated the potentially entangling inquiry by courts and the Equal Employment Opportunity Commission ("EEOC") as to whether alleged religious discrimination occurred in a religious or secular activity of a religious organization.

The substantive constitutional arguments regarding the 1972 Exemption are addressed in detail in the briefs filed by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints and by the United States of America. These briefs carefully describe the constitutionally mandated balance which Congress must strike in making "no law respecting an establish-

ment of religion, or prohibiting the free exercise thereof." Rather than focus on the underpinnings of the constitutional arguments, this brief will focus on the government entanglement problems which religious organizations will face if Section 702 as it is presently written is declared unconstitutional.

The very entanglement problems which the Constitution prohibits and which Congress intended to eliminate were encountered when the lower court in *Amos* requested information and production of documentation regarding the activities of the Mormon Church. In this regard, the court was attempting to distinguish between the religious and secular activities of the Church and thereby became involved in a detailed examination of Church beliefs, practices, finances, and administration, including a substantive evaluation of the scope and sincerity of asserted religious beliefs.

The entanglement problems experienced by the Mormon Church in *Amos* are but examples of the problems which will be experienced by all religious organizations, including the Seventh-day Adventist Church, if *Amos* is affirmed. The publishing ministry of the Seventh-day Adventist Church presents an example of an area for potential entanglement if the principles announced by the *Amos* court below are followed. As part of its publishing ministry, the Seventh-day Adventist Church utilizes retail book outlets to disseminate literature to church members and non-members alike. While many of the books sold are theological in nature, others deal with topics which, although central to the religious beliefs of Seventh-day Adventists, some would consider secular. For example,

the sale of books advocating healthful living through proper diet and exercise is very much related to the Church's doctrines regarding health, and at the same time such books are in demand by those who seek their contents independent of any view of religious teachings. Whether an enterprise such as a Seventh-day Adventist retail book outlet passes muster as a "religious activity" under the vague and ill-defined test suggested by the lower court in *Amos* begs the more important question of whether there is excessive entanglement created by the application of the test at all. In enacting the 1972 Exemption, Congress, as a body, recognized the impossibility and impropriety of doing what the *Amos* court has attempted to do.

The threat posed to religious organizations by striking down or narrowing the 1972 Exemption is real, not imaginary. Like the court in *Amos*, other governmental entities are becoming entangled in sensitive religious matters in a manner adverse to First Amendment rights and adverse to the clearly expressed intention of Congress as evidenced by the amendment of Section 702. The Seventh-day Adventist Church is already experiencing this entanglement in the operation of its health care system. Because of the Church's strong doctrinal emphasis on healthful living, the ecclesiastical umbrella of the General Conference includes the Church's Department of Health and its world-wide health care system, which are jointly charged with the duty to disseminate the Church's beliefs regarding health and to administer to the health care needs of the world. Within the Adventist Health System in the United States there are approximately 150 hospitals, nursing homes and other health care organi-

zations which collectively employ well over 50,000 employees.

Adventist Health System/United States is a nonprofit corporation organized by the Seventh-day Adventist Church to help carry forward the health message of the Church, "to make man whole." The Articles of Incorporation of the Adventist Health System/United States declare that the "specific purpose of this corporation is to preserve the mission of the Seventh-day Adventist Church as it pertains to its health ministry." The relationship between the Church's doctrine and its operation of health care institutions is set forth in the Church's Statement of Philosophy for Health Care Institutions and Services. That Statement summarizes the Church's doctrines and principles regarding health care as follows:

> In summary, the Adventist health-care institution is a corporate extension of Christ's life and mission and is the Seventh-day Adventist Church fulfilling its health and healing ministry. It is therefore indivisible from the church's total ministry in carrying the gospel to all the world.

In this context, the staffing of Seventh-day Adventist hospitals is of vital concern to the Church. The Statement of Philosophy evidences that concern. Although it affirms the Church's commitment to avoid descrimination on the basis of race, ethnic background, or sex, it firmly asserts the right to make employment decisions on the basis of religion:

> The freedom to hire persons whose lives conform to this philosophy is fundamental to the achievement of the objectives of the church.

Section 702 of the Civil Rights Act, as amended in 1972, confirms that freedom. Most importantly, it does so without resort to investigation and inquiry regarding the religious versus secular nature of the activity of a religious organization. Porter Memorial Hospital, a hospital within the Adventist Health System/United States, is currently involved in litigation which addresses the issue of investigation by the EEOC of religious versus secular activities. *Porter Memorial Hospital v. United States of America, Equal Employment Opportunity Commission*, Civ. No. 86-A-1229, United States District Court for the District of Colorado (filed June 18, 1986).

On November 13, 1984, Sandra Elaine Collins (hereinafter "Collins") filed with the EEOC a charge against Porter Memorial Hospital (hereinafter "Porter") alleging employment discrimination solely on the basis of religion. Shortly thereafter, the EEOC began to process and investigate the charge. In a letter sent to Porter, the EEOC stated:

> Your organization is hereby requested to submit information and records relevant to the subject charge of [religious] discrimination filed with this Commission under Title VII of the Civil Rights Act of 1964, as amended. The Commission is required by law to investigate charges filed with it, and the attached request constitutes a part of the investigation.

In *Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), the Fifth Circuit Court of Appeals held that if a religious institution presents convincing evidence that the challenged discrimination falls within the scope of the 1972 Exemption, the EEOC is without jurisdiction to investigate further. In re-

liance upon the 1972 Exemption and the *Mississippi College* case, Porter responded to the EEOC's request for information by presenting an affidavit and other documentary evidence irrefutably establishing the fact that the operation of Porter is an activity of the Seventh-day Adventist Church. On the basis of this evidence, Porter requested the EEOC to determine that it lacked jurisdiction to further process Collins' charge of religious discrimination. Porter also invited any further EEOC inquiries which might be necessary to determine whether Porter was within the scope of the 1972 Exemption, and indicated a willingness to respond to such inquiries.

The EEOC replied by sending an additional questionnaire, dated April 29, 1985, including, among others, the following questions:

1. Provide a detailed explanation which addresses specifically how the Respondent is different in practice than any other secular hospital in Colorado.

2. In actual practice, how was Charging Party's position as Clinical Director of Nursing used to further the religious beliefs and/or tenets of the Church?

3. In actual practice, explain how Porter is furthering the religious beliefs and/or tenets of the Church?

4. Does the Church allow non-Seventh-day Adventist patients to be cared for at the hospital?

5. Does the Church allow smoking in the hospital?

6. Does the Church allow meat to be served to patients?

> 7. Does the hospital require any or all employees and/or patients on a daily, weekly or monthly basis, to attend some form of church religious service where the beliefs and tenets of the church are advocated?

Porter responded, noting that these questions were wholly irrelevant to the issue of whether the EEOC had jurisdiction under the 1972 Exemption to further investigate and process Collins' charge. The 1972 Exemption covers all activities of religious organizations, regardless of considerations such as those raised by the EEOC's second questionnaire. The 1972 Exemption does not specify that an activity of a religious organization must have a certain function or purpose or nature in order to qualify for exempt status. The only qualification is that the activity must be carried out by a religious organization such as the Seventh-day Adventist Church. In *Kings Garden, Inc. v. F.C.C.*, 498 F.2d 51 (D.C. Cir. 1974), the District of Columbia Court of Appeals stated:

> In covering all of the "activities" of any "religious corporation, association, educational institution, or society," the exemption immunized virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act.

Id. at 54. (Footnote omitted.)

In response to the EEOC's second questionnaire, Porter reiterated its position:

> The fact that the Seventh-day Adventist Church is a "religious corporation, association, educational institution or society" and that Porter Memorial Hospital, as part of the Adventist Health Care System, is an "activity" of the Seventh-day Adventist Church should bring the facts of the present case clearly within the 1972 Exemption.

Porter again expressed its willingness to provide any information necessary to determine whether the 1972 Exemption applied to the facts of this case, but declined to answer questions aimed at determining the secular versus religious nature of its activities.

The EEOC has persisted in its investigation and inquiry regarding whether the charge at issue involves an activity which is religious or secular in nature. Even though the EEOC was invited to seek further information concerning whether the operation of Porter is an activity of the Seventh-day Adventist Church, it did not do so.

Instead, the EEOC sent Porter a pre-determination letter indicating its intent to enter a written determination that Collins was discharged due to her religious affiliation and that Collins' "position was secular in nature," involving none of the "tenets, teachings, or practices" of the Seventh-day Adventist Church. Thus, although Porter firmly asserted that the operation of the hospital is central to the objectives, teachings and doctrines of the Seventh-day Adventist Church and supported that assertion with abundant documentation, the EEOC reached a contrary conclusion. The entanglement demonstrated by this

case is the very problem which arises when the government strays beyond the boundaries of the 1972 Exemption.

The distinction between religious and secular activities and between religious and secular jobs finds no basis in statute and has been expressly repudiated by Congress. The EEOC has no authority to narrow the 1972 Exemption by providing exempt status only where religious activities or religious jobs are involved. Regarding attempts to narrow the 1972 Exemption, the Court in *King's Garden, supra,* stated:

> To effect a substantive narrowing of the exemption the courts would have to attempt to divide a sect's various undertakings into "secular" and "religious" categories, but it is precisely this categorization which Congress repudiated in 1972.

498 F.2d at 54, n. 7.

Like the court in the *Amos* case, the EEOC in the *Porter* case is attempting to make a distinction between jobs and activities that are merely associated with a religious institution and those which are substantively more religious in nature. In *N.L.R.B. v. Catholic Bishop,* 440 U.S. 490 (1979), this Court analyzed a very similar situation. In that case, the N.L.R.B. had been making a distinction between schools which were "completely religious" and schools which were "merely religiously associated." The Seventh Circuit Court of Appeals had concluded that the distinction resulted in entanglement problems because it failed to provide a workable guide for the exercise of discretion, especially in an area that "obviously implicates very sensitive questions of faith and tradition." *Catholic Bishop v. N.L.R.B.,* 559 F.2d 1112, 1118 (7th Cir. 1977). On appeal, this Court stated:

> The Board argues that it can avoid excessive entanglement since it will resolve only factual issues.
>
> • • •
>
> [I]t is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F.2d at 1125, 1126. The Court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on the rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.

440 U.S. at 502. In *Porter,* the Church has asserted that the operation of the hospital is motivated by religious beliefs and is carried on in furtherance of the mission of the Seventh-day Adventist Church. The EEOC's process of inquiry here impinges upon Porter's rights in the very manner against which this Court warned. In the *Amos* case before this Court, it is the inquiry and determinations of the judicial branch which have resulted in the unconstitutional entanglement. It should be noted, however, that this Court need not reach the First Amendment entanglement issue to reverse the court below. This Court in *Catholic Bishop* concluded:

> Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call

> upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

Id. at 507.

In this case, Congress has not clearly expressed an intent to bring non-religious activities of religious institutions within the jurisdiction of the courts and the EEOC; to the contrary, by enacting the 1972 Exemption, Congress has unequivocally expressed the opposite intent. This Court should not permit the courts and the EEOC to assume jurisdiction where difficult and sensitive questions of religious faith and practice are involved and government entanglement with religion would result.

To avoid government entanglement with religion in cases where there are claims of discrimination on the basis of religion, both the courts and administrative agencies should make a preliminary determination based upon the following questions:

1. Is the activity in which discriminatory action is alleged an activity of a religious organization?; and,

2. Is the reason for the action in fact religious-based? (i.e. Is the religious-based reason real rather than a pretextual cover for race or sex discrimination, for example?)

If both of those questions are answered in the affirmative, neither the courts nor administrative agencies should undertake any further analysis or inquiry. To do so would lead them into the areas of entanglement addressed above. This Court's opinion in *Ohio Civil Rights Commission v.*

Dayton Christian Schools, 477 U.S. —, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986), supports the suggestion that this two-prong preliminary determination is appropriate. In that case, it was apparently conceded that the operation of Dayton Christian Schools was an activity of a religious organization. What was in dispute was the actual basis upon which the employment of a teacher at the School was terminated. The Board of the School had made conflicting statements regarding the reason for termination and the terminated teacher alleged sex discrimination and retaliation for asserting statutory rights. The School claimed that exercise of jurisdiction over it by the Ohio Civil Rights Commission violated its First Amendment rights. In that context, this Court stated:

> We therefore think that however Dayton's constitutional claim should be decided on the merits, the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, *if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.*

Id. at 91 L.Ed.2d at 522-523 (emphasis added).

The court in *Amos* and the EEOC in *Porter* have gone beyond the boundaries of Title VII and beyond the scope of investigation and analysis authorized by this Court in *Dayton Christian*. In doing so, they have violated the specific intent of Congress in amending Title VII and have placed the government in a position of serious entanglement with religion.

CONCLUSION

Congress carefully balanced the First Amendment considerations when it amended Title VII in 1972. The court below has upset that balance by declaring the amendment unconstitutional. This Court should reverse and restore the time proven balance carefully fashioned by Congress.

JANUARY 5, 1987

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-179 and 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Utah

---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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Nos. 86-179 and 86-401

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
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Appellees.

On Appeals from the United States District Court for the District of Utah

---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

This brief *amicus curiae* is filed with the consent of the parties as provided for in the rules of the Court.

INTEREST OF THE AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 91 national and international unions with a total membership of approximately 13,000,000 working men and women. A primary interest of the AFL-CIO is to secure employment opportunities for working people without regard to race, religion, sex or national origin, an interest that is threatened in part by the broad exemption now contained in § 702 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-1. The AFL-CIO files this brief to argue that § 702's exemption of the non-religious activities of religious organizations from the ban on religious discrimination is inconsistent with the Establishment Clause of the First Amendment.

ARGUMENT

INTRODUCTION AND SUMMARY

From its enactment in 1964 until 1972, Title VII's ban on religious discrimination in employment applied to the non-religious activities of religious organizations; those institutions were afforded an exemption from the ban on religious discrimination only with respect to their "religious activities."[1] In 1972, Congress amended § 702 to remove the word "religious" as a modifier of "activities," thereby exempting religious organizations from the ban on religious discrimination as to "*all* their activities'. S. Conf. Rep. 92-681, 92d Cong., 2d Sess. 16 (1972) (emphasis added); *see also*, 118 Cong. Rec. 7167 (1972) (section-by-section analysis of bill reported by the conference committee).

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[1] Throughout this brief we use "religious organization" and "religious institution" to refer to the category of institutions granted exemption by § 702, *viz.*, a "religious corporation, association, educational institution, or society."

As thus amended, § 702 allows religious organizations to discriminate in employment on the basis of religion even when those organizations operate commercial businesses for profit and would readily concede that the businesses do not constitute religious activity and that no religious tenet or belief calls for such discrimination. As Representative Erlenborn advised the House in discussing the conference report on the 1972 amendments to Title VII:

> [I]t was clearly the thought of the conference that if a religious institution is engaged in a profit making venture they still are not covered by the provisions of this act. [118 Cong. Rec. 7567 (1972)]

The practical impact of this amendment on the job opportunities of America's workers is substantial. While there is no comprehensive published accounting of the commercial enterprises operated by religious organizations, it is apparent from such information as is available that this phenomenon is widespread. *See generally*, A. Balk, *The Religion Business*, 8-11 (1968); M. Larson & C. Lowell, *The Religious Empire* (1976); S. Rep. No. 91-552, 91st Cong. 2d Sess., 1969 U.S. Code Cong. & Ad. N. 2096; H. Rep. No. 91-413, 91st Cong. 2d Sess., 1969 U.S. Code Cong. & Ad. N. 1692.

This Court's opinion in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 299 (1985), shows, to take one example easily at hand, that one small religious foundation operated 38 commercial businesses in four states, including "service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a record-keeping company, a motel, and companies engaged in the production and distribution of candy." *Id.* at 292 & n.2.

The Mormon Church, appellant in No. 86-179, has moreover, been reported to own and operate three television and twelve radio stations, a group of insurance companies, a department store, a number of hotels, a

tourist resort, 650 poultry and dairy farms, a sugar company, 30 canneries, a soap factory, a coal mine, a flour mill, and five salvage processing plants,[2] and to be one of the largest employers in Salt Lake City and the State of Utah.[3]

The Mormon Church, to be sure, states in its brief that the Church does not impose a religious preference with respect to employment in its profit-making activities (C.P.B. Br. 4). But the salient point here is that § 702 allows, and the Church would be free to practice, such discrimination were § 702 held constitutional. Nor, in any event, is there any assurance that other religious institutions have adopted policies as benign or that such policies would be continued were this Court, in contrast to the lower court decisions to date, to uphold § 702's expanded exemption.

The instant case involves a non-profit gymnasium, and the parties understandably have focused their discussions on that enterprise. But the holding sought by appellants —an unqualified affirmation of the constitutionality of § 702 in all its applications—involves considerations that transcend the facts of this case.[4] While, as we explain

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[2] J. Heinerman & A. Shupe, *The Mormon Corporate Empire*, 46-124 (1985); M. Larson & C. Lowell, *Praise the Lord for Tax Exemption*, 203-210 (1968).

[3] J. Heinerman & A. Shupe, *supra*, at 92.

[4] As stated in the Brief of the United States, at (i), the question presented is:

> Whether Section 702 . . . is invalid under the Establishment Clause of the First Amendment to the extent that it exempts the secular activities of [religious] organizations from the prohibition against religious discrimination.

The Mormon Church, in its brief, at (i), states the question with equal breadth:

> 1. Whether Congress acted unconstitutionally when it amended [§ 702] . . . to permit religious employers to hire only members of their own faith, regardless of the nature of the employment activity . . . .

herein, we believe § 702 unconstitutional in its exemption of this gymnasium, a major purpose of our brief is to underline the broader ramifications of § 702's exemption of commercial enterprises of all kinds owned by religious organizations.

Preliminarily, we wish to make clear that we do *not* suggest the exemption originally enacted in 1964 suffered from any constitutional infirmity. The exemption of "religious activities" of religious institutions from a statutory ban on religious discrimination is plainly required in some instances by the Free Exercise Clause, and in all instances is appropriate "to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" *Gillette v. United States*, 401 U.S. 437, 453 (1971), quoting *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting). The same is not true, however, when Congress extends the exemption to nonreligious activities.

We begin our analysis by addressing the United States' contention (U.S. Br. at 37-38) that the Establishment Clause is not implicated at all in this case, because there is no "state action." The United States asserts that a congressional decision "not to exercise its regulatory authority . . . cannot offend the Establishment Clause" (*id.* at 38). But as we show at pp. 7-9, this Court has repeatedly rejected the notion that the Establishment Clause does not reach religious exemptions from general government-imposed norms. The central purpose of the Establishment Clause is to assure government *neutrality* respecting religion. The exemption of religious organizations from a statutory obligation imposed upon all secular organizations is, on its face, a departure from that neutrality, and its permissibility under the Establishment Clause thus turns on whether there exists an adequate secular justification vindicating the differential treatment.

We then turn to the three "secular" justifications for the blanket § 702 exemption advanced in appellants' briefs. At pp. 9-12, we demonstrate that the Mormon Church's contention that the Free Exercise Clause *requires* this sweeping exemption—a contention disclaimed by the United States—is without merit. With respect to most of the non-religious activities of religious institutions, the threshold requirement for invoking the Free Exercise Clause—a showing that the governmental regulation collides with religious belief or practice—will be wholly absent. Indeed, in this case the district court stated that it had not even been contended, let alone shown, that employing non-Mormons or non-observing Mormons in the gymnasium would conflict with any religious tenet of the Church.

This same consideration impeaches the second theory advanced in defense of § 702: that the exemption, even if not required by the Free Exercise Clause, is an allowable accommodation of "free exercise values," freeing religious belief or practice from the burdens that government regulation otherwise would impose. As we show at pp. 12-16, that justification for non-neutrality requires, at the threshold, a demonstration that absent the exemption the government regulation would conflict with religious belief or practice. And here, as in most cases of non-religious activity, that threshold is not present.

The final justification asserted by appellants for the blanket exemption in § 702 is that it avoids the "entanglement" between government and religious institutions incident to resolving disputes over whether particular activities are religious or secular, and avoids as well the risk that erroneous resolutions of such disputes will impinge on true religious activity. But as we show at pp. 16-20, whatever the legitimacy of these concerns in marginal cases, § 702's exemption is vastly overbroad in relation to these concerns. For a vast array of commercial enterprises run by religious organizations,

the conclusion that the activity is secular will be crystal-clear and likely not disputed. And the religious-secular line has already been determined for most activities of religious institutions by virtue of other tax and employment statutes whose exemptions—like that in the 1964 version of § 702—apply only to religious activities. There will thus be relatively few instances where the ban on religious discrimination in Title VII would generate a dispute over this line of demarcation. Against this background, § 702's general exemption in favor of *all* the activities of *all* religious institutions cannot be justified by concerns that are applicable only in *marginal cases* and that could be dealt with (as we show) by techniques that cut less deeply into core Establishment Clause values.

I. THE ESTABLISHMENT CLAUSE REACHES RELIGIOUS EXEMPTIONS FROM GOVERNMENT-IMPOSED NORMS

The United States contends that the complete answer to the Establishment Clause challenge to § 702's blanket exemption for religious organizations is that the freedom of such organizations to discriminate is "not the result of an affirmative grant of authority by Section 702 or any other federal statute" (U.S. Br. 37).

> Prior to the enactment of Title VII, *all* private employers were free to discriminate on the basis of religion; Section 702 simply exempts religious organizations from the antidiscrimination requirement of Title VII . . . . Since Congress' failure to prohibit discrimination prior to 1964 did not constitute an establishment of religion, its decision not to prohibit such discrimination now cannot offend the Establishment Clause. [*Id.* at 37-38, emphasis in Br.]

This argument overlooks the singular role of the Establishment Clause. Congress' choices respecting exemption from general government-imposed obligations are

ordinarily of no constitutional moment, but when the exemption runs exclusively to religious institutions the situation is quite different.

The "central purpose of the Establishment Clause" is "ensuring government neutrality in matters of religion." *Gillette*, 401 U.S. at 449, *viz.*, "to insure that no religion be sponsored or favored", *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). In consequence, "[t]he Court must not ignore that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause," *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). "[T]he Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders', as well as obvious abuses." *Gillette*, 401 U.S. at 452.[5] When government, by exemption, frees religious institutions to engage in practices that are forbidden to all others in our society, the interests protected by the Establishment Clause are directly implicated:

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of endorsement . . . of religion, a core purpose of the Establishment Clause is violated. [*Grand Rapids Dist. v. Ball*, —— U.S. ——, 105 S. Ct. 3216, 3226 (1985)].

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[5] The Court's approach in *Walz* and *Gillette*, *supra*, is sufficient to demonstrate that the United States' thesis is wrong. If the exemption of church property devoted to religious purposes from a general property tax is constitutional on the simple ground that there is no government action, the Court would have had no occasion to undertake the detailed and sensitive inquiry that ultimately guided its decision in *Walz*. See also *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette*, *supra* (confronting the constitutionality of statutes granting exemption from military conscription to conscientious objectors).

Accordingly, an Establishment Clause inquiry is triggered by the creation of an exemption which has the effect of permitting religious institutions to act in the secular world in ways that are denied to all secular institutions. That inquiry is whether there exists "a neutral, secular basis for the lines the government has drawn." *Gillette*, 401 U.S. at 452.

II. THERE IS NO ADEQUATE SECULAR JUSTIFICATION FOR THE EXTRAORDINARY PRIVILEGE PERMITTED RELIGIOUS INSTITUTIONS—BUT NO OTHERS—BY THE EXPANDED § 702 EXEMPTION

The exemption accorded by the original § 702 had a plainly secular justification, *viz.*, protection of free exercise rights. The religion of those who carry out the "religious activities" of religious organizations is obviously central to the free exercise of religious belief and practice. See p. 5, *supra*.

But when religious institutions expand their activities into the secular world, the justification for a § 702 exemption is not self-evident. The activity is by definition not religious in nature, and most often employment on the basis of religion will not be dictated by religious tenet. On what basis, then, can the government's allowance to religious organizations alone of a license to engage in employment discrimination be justified? The briefs of appellants proffer three justifications. We address these in turn and show that none constitute adequate secular justification for the privilege accorded to religious institutions—but to no others—by the expanded § 702.

A. The Blanket Exemption in § 702 Is Not Required By the Free Exercise Clause

The Mormon Church contends that the Free Exercise Clause precludes government bans on religious discrimination in the secular activities of religious organizations (C.P.B. Br. 17-32). According to the Church, as "gov-

ernment clearly can legislatively authorize any conduct which the Free Exercise Clause would compel the government to leave unregulated", the authorization here "cannot constitute an establishment of religion" (C.P.B. 17-18). The United States expressly disclaims any reliance on this theory—"We do not assert that the amendment of Section 702 to encompass all activities of religious institutions was required by the Free Exercise Clause" (U.S. Br. 17)—and with good reason. In the vast majority of cases, including *this* case, a ban on religious discrimination in the secular activities of religious organizations does not raise even a colorable free exercise claim.

"Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Board*, 454 U.S. 707, 713 (1981). Thus, a statute cannot violate a claimant's free exercise rights "unless, at a minimum," compliance with the statute would "actually burden[] the claimant's freedom to exercise religious rights." *Tony and Susan Alamo Foundation*, 471 U.S. at 303. *See also, Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *United States v. Lee*, 455 U.S. 252, 256-257 (1982).

Except, then, where a religious organization's tenets dictate religious hiring even in purely secular activities, a ban on religious employment discrimination in secular activities does not generate the threshold requirement for a free exercise claim. For the religious organization could not demonstrate the "minimum": that compliance with that ban would violate religious beliefs or conflict with religious practice. Thus, conformity to the Free Exercise Clause cannot constitute a justification for § 702's present blanket exemption for all secular activities of all religious organizations.

Indeed, what we have said to this point disposes of the free exercise claim on the facts of the instant case.

The gymnasium in this case operates like any other gymnasium in our society, and performs no religious mission; albeit on a non-profit basis, the facility competes for the general public's patronage against like facilities that are operated by others for profit. The district court's opinion states that "there is no evidence *or a contention* that the religious tenets of the Mormon Church involve or require religious discrimination in employment" (J.S. App. 15a; emphasis added), and "[n]one of the affidavits submitted even remotely suggest that the Mormon Church holds any religious tenet that requires all persons employed by its corporation in secular, non-religious activities to be templeworthy Mormons" (*id.* 54a).[6]

Of course, it is possible that future cases may arise in which a religious organization *does* have a religious tenet requiring the employment of only its members in secular activities. Whether Congress is required by the Free Exercise Clause to grant *such* an employer an exemption from Title VII's ban on religious discrimination is a more complex question. As that question is not presented here, we go no further then to note the principles that would govern its disposition. In such a case, as there would be a conflict between government regulation and religious belief, the inquiry would advance to the second stage, which requires balancing the interest in fidelity

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[6] The Mormon Church contends in *this* Court—but apparently not in the court below—that its religious discrimination against appellee Mayson *was* dictated by a religious tenet (C.P.B. Br. 4-5, 19-20). We are advised that appellees will respond to that contention at length, and do not undertake to duplicate that showing here. It is sufficient to observe that ambiguous and carefully guarded affidavits claiming that employment of Church members is "consistent with" Church doctrine (C.P.B. Br. 5), and that because salaries of gymnasium employees are paid "primarily" by Church members "[t]he Church believes that it should benefit members with employment possibilities in which these contributed funds are expended" (*id.* 4) are not claims that such religious discrimination is *required* by religious tenet.

to the organization's religious tenets against the governmental interest in eliminating employment discrimination. This Court's decisions show that the government's interest in banning employment discrimination is of the highest order and that free exercise interests are entitled to their least weight when they are transported to the commercial arena and the consequences are felt by employees:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. [*United States v. Lee*, 455 U.S. at 261].

It thus appears that a ban on religious discrimination would withstand a free exercise challenge even from a religious organization acting as a secular employer whose discrimination in secular employment is based on a religious tenet. But whatever the outcome in *such* a case, the Free Exercise Clause plainly does not justify the sweeping exemption in § 702 which licenses religious discrimination by religious institutions *whether or not* that discrimination is based on a religious tenet.

B. The Blanket Exemption in § 702 Cannot Be Justified As a Permissible Accommodation of Religious Practice or Belief

What we have said to this point indicates as well the fallacy in the second justification proffered by appellants: that even if the § 702 exemption for the secular activities of religious organizations is not compelled by the Free Exercise Clause, Congress was free to enact that exemption in order to accommodate "free exercise values." The accommodation principle comes into play when a law of general applicability collides with some citizens' religious practices or belief, but despite that collision the Free

Exercise Clause does not oblige the government to grant an exemption. In that setting, this Court has ruled that the government need not inevitably trample religious practice or belief simply because it is constitutionally empowered to do so, and accordingly may, in appropriate circumstances, adjust its secular legislation to mitigate the intrusion on religious practice or belief, *viz.*, to accommodate "free exercise values" by avoiding "unnecessary clashes with the dictates of conscience." See *Walz, supra; Gillette, supra; Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (dictum).

The tenets of most religious organizations do not require religious hiring in secular employment. Where that is true the threshold for accommodation—a governmental desire to lift the burden that generalized legislation otherwise would impose on *religious belief or practice*—is absent; there is, *as to them*, no free exercise value to accommodate. Accordingly, § 702's blanket exemption for all secular activities of all religious organizations cannot be justified on an accommodation rationale.

The Mormon Church argues for a new and different kind of "accommodation": that government should be free to accommodate religious institutions *as such*, by exempting those organizations from general legislation even when they enter the secular world of commerce and even when there is no conflict with religious practice or belief. (C.P.B. Br. 24-25). That thesis has no support in this Court's decisional law, and, we submit, conflicts with the core purpose of the Establishment Clause. For the essence of the neutrality commanded by the Establishment Clause is that government not favor religious institutions *as such*. Where an accommodation does not safeguard religious practice or belief, the type of favoritism the Establishment Clause is designed to forbid is precisely what results from a blanket exemption of religious organizations as such from the duties imposed on all others in the secular commercial world.

The Mormon Church purports to find support for its thesis in *Walz*. But while the Court upheld an exemption for religious institutions, it did so *solely* upon finding that the exemption eliminated a conflict between general legislation and religious *practice*. The property tax exemption at issue in *Walz* did not apply to church property used for secular purposes; it extended *only* to "religious properties used solely for religious worship", 397 U.S. at 666. And the exemption was upheld precisely because the state was accommodating "the exercise of religion" by sparing that exercise from a government-imposed financial burden.

> We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions. [*Id.* at 673].

Even then, the fact that the exemption in *Walz* ran to religious organizations as such—and thus cut closer to the core of Establishment Clause concern than exemptions running to an individual's religious practice—caused this Court to temper its holding in a manner that has not been deemed necessary when upholding accommodations favoring individuals: the Court placed heavy emphasis on the fact that "churches as such" were not "singled out", but rather were bracketed with other nonprofit institutions:

> [New York] has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. [*Id.* at 673].

See also NLRB v. Catholic Bishop, 440 U.S. 490, 518 n.11 (1979) (dissenting opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ.).

In sum, the accommodation doctrine cannot justify *en toto* the sweeping exemption in § 702—which operates

without concern for religious practice or belief—nor can that doctrine justify an exemption on the facts of this case (where the discrimination was not dictated by religious tenet).

It remains true, of course, that there may be instances where a particular religious institution's religious tenets *do* dictate discrimination in secular employment. Whether the government is free to accommodate such tenets by exempting tenet-based employment discrimination in non-religious activities from an otherwise general statutory ban is a question of considerable delicacy. This Court has never addressed in any context the government's power to accommodate the religious beliefs of religious institutions when those institutions choose to enter the secular world as employers. The declaration in *United States v. Lee*, 455 U.S. at 261—"[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity"—suggests that accommodation is more questionable in this context than in the more parochial settings in which it heretofore has been upheld. *Lee* indicates too that an accommodation that enables the religious institution to use its leverage as commercial employer to impose its religious beliefs on its employees is particularly questionable. *See* 455 U.S. at 261. Moreover, the accommodation of the tenets of religious *institutions*, without a concomitant accommodation of the same religious tenets when held by *individual* employers, bespeaks a preference for religious *institutions* (rather than religious beliefs) that impinges on core Establishment Clause concerns.

While we thus believe that the limits of permissible accommodation would be exceeded even by judicially narrowing § 702's exemption to tenet-based discrimination, resolution of this issue ought to await a case in which it

is squarely presented, *viz.*, in which the discrimination at issue is tenet-based.[7] What is important for now is that, whatever the outcome in *such* a case, the accommodation doctrine plainly does not justify the sweeping exemption in § 702 of discrimination by religious institutions *whether or not* that discrimination is based on religious tenet.

C. The Blanket Exemption in § 702 Is Not Justified By Concerns for Avoiding the "Entanglement" Incident To Resolution of Disputes Over Whether Particular Activity is "Religious" and for Providing a "Prophylactic" Against Erroneous Decisionmaking

Appellants assert two related justifications for the expansion of the § 702 exemption, both resting on the point that in its absence the courts would be called upon to determine which activities of religious institutions are "religious" and which are not: first, that the very process of judicial decisionmaking entails a degree of "entanglement" between the government and religious institutions that Congress is free to pretermit by a blanket exemption; and second, that as decisionmaking inevitably carries with it the risk of error, Congress is free to enact a blanket exemption as a prophylactic against erroneous judicial intrusions upon what is truly religious activity.

Although it is doubtful that these concerns were in the mind of the Congress that expanded the § 702 exemption,[8] it cannot be gainsaid that these concerns

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[7] The Court in *Lee* expressly refrained from deciding a somewhat similar accommodation issue, 455 U.S. at 260 n.11.

[8] Both appellants attribute these concerns to Congress, citing statements of Senator Ervin (U.S. Br. 16-17; C.P.B. Br. 26-28). But most of the statements upon which they rely were made by Senator Ervin in support of an earlier proposed amendment—to exempt religious institutions from Title VII entirely—that was overwhelmingly defeated. Moreover, it is clear when those statements are read in context that Senator Ervin was not complaining that line-drawing between secular and religious activities would be

might conceivably have some weight when the focus is on an activity that falls close to the line between religious and secular, and when the answer has not already been derived from an inquiry that Congress directed pursuant to some other federal statute. But as a justification for the blanket exemption in § 702 these concerns fall woefully short. Put another way, that exemption is vastly overbroad if this is the only secular justification that can be offered.

To begin with, for a broad array of commercial enterprises run by religious organizations, the conclusion that the activity is secular and implicates no religious tenets will be crystal clear; indeed, will likely not be contested by the organization. Congress knew full well in 1972 that commercial enterprises of this character abound; indeed, Congress had amended the Internal Revenue Code three years earlier to tax the unrelated business income of churches precisely because this is so. S. Rep. No. 91-552, *supra;* H. Rep. No. 91-413, *supra.* By reason of that amendment to the tax code, while 26 U.S.C. § 501(c)(3) still grants an exemption, *inter alia,* to institutions operated for "religious . . . purposes", 26 U.S.C. § 511(a) imposes a tax on their "unrelated

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entangling or susceptible to error, but that it would be "impossible" because as a theological matter *all* activities of religious organizations are "religious." That theological contention commanded 25 votes; 55 Senators found it unconvincing. 118 Cong. Rec. 1995 (1972). The United States' assertion that as Senator Ervin supported both amendments his statements in support of the one that was defeated are "relevant in ascertaining the purpose of the exemption that was adopted by Congress" (U.S. Br. 16 n.8) is, to say the least, a *non-sequitur.* The lone arguably pertinent statement by Senator Ervin in support of the amendment that was adopted was that its purpose was "to take the political hands of Caesar off the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (1972). We do not presume to guess whether that statement was meant to be an articulation of the concerns about line-drawing advanced by appellants, or a reiteration of Senator Ervin's theological view.

business taxable income," which 26 U.S.C. § 513 defines as that emanating from a

> trade or business the conduct of which is not substantially related (aside from the need of such [religious] organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its . . . purpose or function constituting the basis for its exemption under Section 501 . . .

Every religious institution—or, at least, every such institution that claims a tax exemption for its members' donations—thus identifies annually those of its profit-making enterprises that are not religious in character, as well as a substantial portion of its non-profit activities.[9] At least as to those there is no conceivable "entanglement" or "prophylactic" rationale for an exemption from § 702, and that rationale cannot justify a favoritism toward religious institutions' commercial enterprises that, on its face, cuts into core Establishment Clause values.

To be sure, the tax code may not provide the answer to the "religious" versus "secular" issue as to some non-profit activities of religious institutions.[10] But as to some of these the secular character of the activity will, again, be crystal-clear and not disputed. And as to others the answer will already have been determined because the obligation to comply with other federal employment statutes turns on whether the activity is secular

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[9] The Internal Revenue Service requires that organizations exempt under § 501(c)(3) must file returns respecting "unrelated" activities (apart from certain specifically enumerated activities which are excepted), even though they are non-profit, if such activities have gross receipts of $1,000 or more in the tax year. *See*, IRS Form 990-T and accompanying instructions; IRS Publication 598.

[10] As noted in footnote 9, *supra*, there are some activities excepted from the obligation to report respecting "unrelated" non-profit activities.

rather than religious. *See, e.g.*, 26 U.S.C. § 3309(b)(1)(B) (Federal Unemployment Tax Act); 26 U.S.C. § 203(s) and 29 C.F.R. § 779.214 (1984) (Fair Labor Standards Act). *And see, Tony and Susan Alamo Foundation, supra. See also,* the National Labor Relations Act, 29 U.S.C. §§ 151*ff* [11] and Title VII itself in its prohibition of discrimination based on race, sex and national origin.[12]

Taking into account the full range of federal law on the books there are, accordingly, few activities of religious institutions as to which the line-drawing the § 702 exemption is purportedly designed to obviate has not already been done. And, however large the category of

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[11] The NLRA does not contain any exemption for religious institutions, but the NLRB and the courts have had to distinguish religious from secular activities in order to determine the propriety of NLRA regulation in light of the Religion Clauses. *NLRB v. Catholic Bishop, supra; NLRB v. St. Louis Christian Home,* 663 F.2d 60 (8th Cir. 1981); *Tressler Lutheran Home for Children v. NLRB,* 677 F.2d 302 (3rd Cir. 1982); *St. Elizabeth's Community Hospital v. NLRB,* 707 F.2d 1436 (9th Cir. 1983); *Denver Post of the Nat'l Soc'y of the Volunteers of America v. NLRB,* 732 F.2d 769 (10th Cir. 1984); *Volunteers of America-Minnesota v. NLRB,* 752 F.2d 345 (8th Cir.), *cert. denied,* 105 S.Ct. 3502 (1985); *NLRB v. Salvation Army of Mass.,* 763 F.2d 1 (1st Cir. 1985); *Volunteers of America-Los Angeles v. NLRB,* 777 F.2d 1386 (9th Cir. 1985). See also, *Catholic High School Ass'n v. Calvert,* 753 F.2d 1161 (2d Cir. 1985) (state labor relations board).

[12] The situation here is as in the case of the NLRA discussed in the preceding footnote. *See, e.g., McClure v. Salvation Army,* 460 F.2d 553 (5th Cir.), *cert. denied,* 409 U.S. 896 (1972); *EEOC v. Mississippi College,* 626 F.2d 477 (5th Cir. 1980), *cert. denied,* 453 U.S. 912 (1981); *EEOC v. Southwestern Baptist Theological Seminary,* 651 F.2d 277 (5th Cir. 1981), *cert. denied,* 456 U.S. 905 (1982); *EEOC v. Pacific Press Pub. Ass'n.,* 676 F.2d 1272 (9th Cir. 1982); *Rayburn v. General Conf. of Seventh-Day Adventists,* 772 F.2d 1164 (4th Cir. 1985); *cert. denied,* 106 S.Ct. 3333 (1986); *EEOC v. Fremont Christian School,* 781 F.2d 1362 (9th Cir. 1986); *Ninth & O Street Baptist Church v. EEOC,* 616 F. Supp. 1231 (W.D.Ky. 1985), *aff'd mem.,* 802 F.2d 459 (6th Cir. 1986).

open cases may be, concerns about line-drawing cannot serve as the rationale for exempting all the *other* activities of religious institutions where the secular character is either undisputed or already established.

If Congress had been genuinely concerned about the marginal cases, it was open to the Legislature to provide safeguards in the statute—in the form of substantive benchmarks, presumptions, requirements that doubts be resolved in favor of the religious institution, limitations on discovery, etc.—to address those concerns. Indeed, this Court in making related decisions under the Religion Clauses has already articulated standards that are particularly sensitive to the interest in non-intrusion by government into religious affairs. The courts resolve cases implicating that interest without becoming "arbiters of scriptural interpretation," *Thomas v. Review Board*,, 450 U.S. at 716, by confining their inquiries to the honesty of the claimed conviction, *id.*, and the "objectively ascertainable facts concerning the [] nature and scope" of the activities in question, *Tony and Susan Alamo Foundation*, 471 U.S. at 299.

It is doubtful, therefore, that the concerns for "entanglement" and "prophylaxis" would justify an exemption even for the marginal cases. But however such justifications might fare in determining the validity of a narrowly-drawn statute, there can be no doubt that these all but evanescent concerns do not provide a basis for the wholesale exemption of *all* secular activities of *all* religious institutions from Title VII's ban on employment discrimination. A blanket exemption to religious institutions as such without any secular justification for that exemption in the majority of its applications cannot, we submit, be squared with the Establishment Clause.

CONCLUSION

For the reasons stated above, the Court should declare § 702 as amended unconstitutional insofar as it extends its exemption to activities other than "religious activities".

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-179 and 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,

Appellants,

v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

1. Whether § 702, which allows religious employers to discriminate on the basis of religion in completely non-religious businesses and among employees whose duties are purely secular, impermissibly advances religion in violation of the establishment clause?

2. Whether, in the absence of § 702, the Mormon Church violated Title VII by firing Appellee Mayson because he failed to comply with purely religious conditions imposed upon him after sixteen years of satisfactory employment, even though his continued employment as a building engineer in a public gymnasium entailed only secular activities?

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CONSTITUTIONAL PROVISIONS AND STATUTORY AUTHORITY

U.S. Constitution, Amendment I ..... *passim*
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CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League ("ADL") was organized in 1913 as a section of the B'nai B'rith to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States.

Among its other activities directed to these ends, ADL has filed briefs *amicus curiae* opposing practices and policies which threaten to undermine the separation in this country between church and state. Briefs have been filed in such cases as *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963).

ADL also supports the rights of all groups to practice their religion free from unjustified governmental interference. ADL has filed briefs in *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Sherbert v. Verner*, 374 U.S. 398 (1963); and *Torcaso v. Watkins*, 367 U.S. 488 (1961).

In the case now before it, the Court is asked to decide whether § 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, allows the Mormon Church to fire a building engineer responsible for maintaining a public gymnasium owned by the Mormon Church, because he failed to fulfill religious requirements it imposed. As an organization committed to the right of all citizens to enjoy civil rights under law, ADL believes that such religious discrimination may not be tolerated. ADL believes that the exemption relied upon by the Church, which applies to wholly secular activities, is a patent violation of the establishment clause. While ADL believes that governmental regulations such as Title VII should not be applied so as to interfere with religious activities, it is of the view that existing statutory and constitutional doctrines adequately protect against this possibility.

SUMMARY OF ARGUMENT

I. Section 702 violates the establishment clause because it has the primary effect of advancing religion and thereby fails the second prong of the test defined by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The statute advances religion in the following three ways: it benefits religious employers at the direct expense of their employees; it permits coercion of religious fidelity from employees; and it authorizes government-sanctioned religious discrimination. Moreover, § 702 is not required to spare Title VII from constitutional infirmity because courts can readily apply Title VII to religious institutions without creating excessive entanglement problems.

II. Because § 702 is invalid, Title VII must be applied to the Mormon Church as to all other employers. Firing a building engineer for failure to adhere to religious conditions imposed by the Church is a plain case of religious discrimination and is unlawful. Any legitimate interest the Church has in preserving its religious integrity by hiring only co-religionists is already well protected by a statutory provision barring government interference with religiously-based hiring decisions by religious schools; by rulings that Title VII does not apply to hiring ministers or minister-like employees; and by constitutional prohibitions against government interference with religious doctrine and internal church affairs. The free exercise clause prevents Title VII from being applied in a manner which unduly interferes with the religious rights of the employer. Because no religious practice of the Morman Church is burdened by applying Title VII to the firing of a building engineer at a public gymnasium, the Church is not exempt from Title VII on the facts of this case.

ARGUMENT

POINT I

SECTION 702 IS UNCONSTITUTIONAL BECAUSE ITS BROAD EXEMPTION OF RELIGIOUS ORGANIZATIONS FROM TITLE VII'S PROHIBITIONS AGAINST RELIGIOUS DISCRIMINATION VIOLATES THE ESTABLISHMENT CLAUSE

At issue in this case is whether § 702 of Title VII of the Civil

Rights Act violates the establishment clause.[1] This Court has repeatedly reaffirmed the three part analysis it employs in evaluating an establishment clause challenge. To survive, the statute must have a secular purpose; its primary effect must be neither to advance nor to inhibit religion; and it may not excessively entangle government in the affairs of religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 105 S. Ct. 3216 (1985). The failure to satisfy any one of these criteria will render a statute constitutionally infirm.

Appellees assert that § 702 violates all three prongs of the *Lemon* test. In this brief we focus on the second prong—which Appellants, Presiding Bishop of the Church of Jesus Christ of Latter-day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints, have simply ignored—and we demonstrate that § 702 violates the establishment clause because it has the primary effect of advancing religion.[2] We then respond to Appellants' argument that, notwithstanding the clear failure to comply with the *Lemon* test, § 702 should be upheld because it is required to save the rest of Title VII from violating the free exercise clause.

A. Section 702 Impermissibly Advances Religion

Section 702 of Title VII of the Civil Rights Act has the primary effect of advancing religion and, therefore, clearly violates the establishment clause. *See Estate of Thornton v. Caldor*, 472 U.S. 703, 105 S. Ct. 2914 (1985).

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[1] Section 702 states in relevant part:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities.

[2] Appellants argue that the three part *Lemon* test does not apply. They instead contrive a novel test which omits the most critical inquiry—whether the statute has the primary effect of advancing religion. *See* Brief for the Appellants at p. 23. While Appellants' reluctance to grapple with this issue is understandable, their suggestion that the Court should ignore the central issue of whether a statute promotes the establishment of religion and their insistence that the Court should depart from its precedents are without foundation or merit.

Section 702 specifically exempts religious employers from the requirements of Title VII and allows them to discriminate on the basis of religion. This special privilege extends to all businesses owned by religious organizations, even those without any demonstrable religious orientation and those which are dedicated solely to making money.

By granting religious employers a privilege denied to all others, § 702 impermissibly advances religion in at least three distinct ways: 1) it confers a benefit to religious employers at the direct expense of others; 2) it provides religious employers with a powerful weapon for imposing their religious faith on employees; and 3) it creates a symbolic link between the government and religion.

1. Section 702 Confers Special Benefits On Religious Employers at the Expense of Others

The statutory exemption of § 702 impermissibly advances religion because it provides a special benefit to religious employers at the direct expense of the employees of those religious organizations and at the expense of competing employers.

In *Estate of Thornton v. Caldor*, 472 U.S. 703, 105 S. Ct. 2914 (1985), this Court struck down, as violative of the establishment clause, a Connecticut law which guaranteed all employees the right to take their Sabbath off from work. The Court found the law invalid because it dictated that Sabbath observance automatically overrides secular interests in the workplace; because it took no account of the convenience or interests of the employer or of the other employees who did not observe the Sabbath; and because the employer and others were therefore required to adjust their affairs whenever the statute was invoked by an employee. No exception was provided for situations where honoring the dictates of the Sabbath observer would cause the employer substantial economic burdens or where the employer's compliance would significantly burden other employees required to work in place of the Sabbath observers. 472 U.S. at —, 105 S. Ct. at 2918. The Court found that:

> This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the religion clauses, so well articulated by Judge Learned Hand:

> "the First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."

Id. (citation omitted).

Section 702 creates the same "unyielding weighting" in favor of religious employers with complete disregard for the rights of their employees. While the statute struck down by the Court in *Caldor* merely imposed substantial economic burdens on non-religious employees and co-workers, the statute at issue here can deprive non-religious employees of their livelihood. A religious employer need only invoke the protection of the exemption, and the rights of secular employees are automatically abrogated. The statute allows a qualified, competent employee such as Mayson to be arbitrarily fired after sixteen years of faithful service merely because he does not attend church with regularity.

Section 702 also provides religious employers with a significant benefit—an exemption from employment regulations—at the expense of competing secular employers. By granting religious employers a broad exemption, the government, in effect, is sponsoring religion-owned businesses. Government sponsorship of religion is one of the primary evils against which the establishment clause is designed to defend. *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 772 (1972). Sponsorship of religion through an exemption from statutory requirements "is a sure formula for concentrating and vastly extending the worldly influence of those religious sects having the wealth and inclination to buy up pieces of the secular economy." *King's Garden Inc. v. FCC*, 498 F.2d 51 at 55 (D.C. Cir. 1974) (footnote omitted). *See* Opinion of the District Court, Appendix to Jurisdictional Statement (*"App"*), at 69.

This benefit is especially obvious for those religious groups, like the Mormon Church, that require their members to pay a tithe on their income. An employee of a Church-owned business who does not give back ten percent of his pre-tax salary is not a Mormon in good standing. Firing him, therefore, is religious discrimination but is exempted from Title VII by § 702. In effect, then, the exemption permits Mormon employers to require employees to return ten percent of their salaries to the Church, an economic advantage not available to competing employers who are not protected by § 702.

The economic benefit conferred on religious entities by § 702 extends to all business ventures, including those businesses that are totally nonreligious. As the Court of Appeals for the District of Columbia has stated,

> the exemption immunizes virtually every endeavor undertaken by a religious organization. If a religious sect should own and operate a trucking firm, a chain of motels, a racetrack, a telephone company, a railroad, a fried chicken franchise, or professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act.

King's Garden Inc. v. FCC, 498 F.2d 51, 54 (D.C. Cir. 1974) (Wright, J.) (footnote omitted).[3]

The Mormon-owned business involved in the instant case serves as an excellent example of the competitive advantage § 702 provides religious employers. One of the Appellees in this case, Frank Mayson, was employed at a public gymnasium located in downtown Salt Lake City that is owned by the Mormon Church. The gym contains the same facilities found at any commercial gymnasium or health club, including a swimming pool, saunas, steam rooms and whirlpools, basketball, volleyball, racquet ball and squash courts, exercise and weight lifting facilities and a running track. It contains barber and beauty shops, men's and women's massage salons and a snack bar, which are run for profit as private concessions. The gym is open to all members of the public for annual or daily membership fees. It places radio, television, and print media advertisements, none of which contain any reference to the relationship between the gym and the Mormon Church. *App.* at 13-16.

In short, the Deseret gymnasium is a public facility indistinguishable from any other gym or health club, except that it is owned by the Mormon Church. Nonetheless, § 702 allows the gym to require all of its employees to return ten percent of their income to

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[3] In *King's Garden*, 498 F.2d 51, the Court of Appeals for the District of Columbia found, in *dictum*, that § 702 obviously violated the establishment clause. *See also Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983).

their employer, something no competing health club can do. The economic advantage to the Church and to the secular businesses it owns could not be more clear.

2. Section 702 Provides Religious Employers With a Means of Imposing Their Faith Upon Employees

Section 702 further advances religion by conferring upon religious organizations a means of coercing religious obedience from their employees. Granting an employer an exemption to a regulatory scheme in order to accommodate that employer's religious beliefs violates the establishment clause if it "operates to impose the employer's religious faith on the employees." *United States v. Lee*, 455 U.S. 252, 261 (1982).

Because of § 702, thousands of employees of businesses owned by religious organizations may be faced with a choice: complying with the religious beliefs of their employers or losing their means of livelihood. "[T]he exemption invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion." *King's Garden*, 498 F.2d at 55.

The § 702 exemption is so broad and lacking in standards that religious employers may use it overtly to foist their religious views on all employees. A religious employer need not even devise a pretense; he may threaten to fire employees as a device for spreading religious faith. And such threats of dismissal may occur in the context of businesses that happen to be owned by a religion but which otherwise have nothing to do with religion.[4]

In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), this Court struck down a similar law as violative of the establishment clause. The statute at issue in that case conferred upon churches the ability to veto a liquor license application from any restaurant within

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[4] Section 702 may thus create a climate in which it is easier for members of majority religions to find employment than it is for members of minority religions or for the non-religious. This is another way in which § 702 impermissibly advances religion.

a prescribed distance of a house of worship. This Court found that the statute impermissibly advanced religion because:

> The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith.

Id. at 125.

As in *Larkin*, the statute at issue here confers a privilege which requires no reasons, findings, or conclusions from the religious employer and which totally lacks any governing standards. It can obviously be used to pursue the kind of "explicitly religious goals" that this Court found impermissible in *Larkin*. Section 702 allows a religion to take advantage of its position as employer and use the exemption from Title VII as a tool to proselytize thousands of secular employees. That is a prospect even more daunting than that which concerned the Court in the *Larkin* case.

3. Section 702 Creates a Symbolic Link Between Government and Religion

Section 702 impermissibly advances religion by creating a symbolic link between government and religion. As this Court recently stated:

> Government promotes religion . . . when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the establishment clause is violated.

Grand Rapids School Dist. v. Ball, 473 U.S. 373, —, 105 S. Ct. 3216, 3226 (1985).

The § 702 exemption creates a gross distinction between businesses owned by religious groups and businesses not owned by religious groups. Religious employers are granted the ability, denied

all others, to fire employees who do not conform to their religious beliefs. The exemption conveys the impression that government is lending its support to the employer's demands of religious fidelity.

There is a strong national commitment to fight discrimination in the workplace. A broad exemption exclusive to religious employers—one which includes secular activities—can only be perceived as a complete rejection of equal employment principles. This perception will be especially acute among employees in church-owned businesses who learn, after being fired on religious grounds, that a special provision of the anti-discrimination law denies them any relief.

B. Section 702 Is Not Required to Save Title VII From Excessive Entanglement Problems

As noted earlier, Appellants have by and large circumvented the question of whether § 702 has the primary effect of advancing religion. In addition to avoiding the three prong *Lemon* test, Appellants have relied upon the argument that § 702 must be found constitutional because it is required to save the balance of Title VII from entanglement problems. As we show below, however, application of Title VII to the secular activities of religious institutions creates no entanglement problems whatsoever.

Title VII and other laws concerning the workplace are routinely applied by the courts to religious employers in the context of sexual and racial discrimination without creating entanglement problems. Most recently, this Court in *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 105 S. Ct. 1953 (1985), ruled that the Fair Labor Standards Act applies to employees of a religious enterprise, over objections that such application would violate the employees' free exercise rights and would excessively entangle the state in religion. The Court found that the inquiries required by the law did not resemble "the kind of government surveillance this Court has previously held to pose an intolerable risk of government entanglement with religion." 471 U.S. at —, 105 S. Ct. at 1964 (footnote omitted). *See also EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982).

Application of Title VII to unlawful religious discrimination by a religious organization is no more entangling than its application to other kinds of discriminatory conduct. *See App.* at 44-48. Entanglement has only been found in cases involving ongoing government surveillance of religious institutions. Illustrative is *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in which this Court held that the supervision necessary to ensure that teachers in parochial schools do not convey religious messages to their students would constitute excessive entanglement of church and state:

> Comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Id. at 619.

This sort of ongoing, close and continuous surveillance of religious personnel has been involved in cases where this Court has found excessive entanglement. *See Aguilar v. Felton*, 473 U.S. 402, —, 105 S. Ct. 3232, 3237-38 (1985) ("[B]ecause assistance is provided in the form of teachers, ongoing inspection is required to insure the absence of a religious message."). Conversely, in situations where ongoing and continuous supervision of a religious entity has not been required, this Court has declined to find excessive entanglement. *Id. See Lynch v. Donnelly*, 465 U.S. 668, 684 (1983) (excessive entanglement requires ongoing, day-to-day interaction between church and state); *Mueller v. Allen*, 463 U.S. 388, 403 n.11 (1993).

In applying Title VII to religious institutions, absolutely no ongoing surveillance of, or intrusion into, the religious entity by the state is required. At most, to insure it does not tread on a church's free exercise rights, a court may determine the extent to which religious doctrine demands religious discrimination. This type of analysis bears none of the hallmarks of entanglement, is completely inoffensive to the Constitution, and is routinely performed. *See Alamo Foundation*, 471 U.S. at —, 105 S. Ct. at 1963-64; *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1971); *Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970) (State can determine without entanglement whether purported church is entitled to tax exemption).

In this case, the district court inquired whether religious doctrine demanded that all employees at Deseret Gymnasium be Mormons. *See App.* at 13-18. Such an inquiry, undertaken to determine whether or not the Mormon Church has violated Title VII, is unexceptional and in no way constitutes excessive entanglement of government with religion. Even if Appellants' basic proposition were correct—that a statute which would otherwise violate the establishment clause is not unconstitutional if found to be necessary to avoid excessive entanglement—the basis for such an argument is nowhere present in this case. Section 702 is not required to save Title VII from entanglement problems and is unconstitutional for violating the establishment clause.

POINT II

THE COURT SHOULD AFFIRM THE DISTRICT COURT'S FINDING THAT THE FIRING OF MAYSON BY THE MORMON CHURCH VIOLATED TITLE VII NOT BY REFERENCE TO THAT COURT'S COMPLEX TEST BUT BY APPLYING ESTABLISHED CONSTITUTIONAL PRINCIPLES TO THE UNDISPUTED FACTS OF THIS CASE

The district court in this case properly found that the broad exemption provided by § 702 is unconstitutional as applied to non-religious activities of religious organizations. The court further held that the firing of a building engineer by the Mormon Church violated Title VII. The district court arrived at that result by employing an elaborate three part test to distinguish between the Church's religious activities, properly protected by the exemption, and its non-religious activities, which the court held to be subject to Title VII.[5] Judge Winder held the § 702 exemption unconstitutional only

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[5] The test devised by the district court required it to make three inquiries: First, a court must decide if there are close ties between the religious organization and the activity at issue with regard to financial affairs, day-to-day operations, and management. Second, it must determine if there is a nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization. If both queries are answered in the affirmative, then the activity at issue is religious and exempt from Title VII coverage. Where the nexus between the activity in question and the religious tenets of the religious organization is tenuous or non-existent, the court must examine the relationship between the specific job performed by the employee and the religious rituals or tenets of the religious organization. *App.* at 10-11,

"as applied" to non-religious activities in an attempt to follow this Court's mandate that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

The district court's goal—to protect the free exercise rights of religious organizations within the constitutional reach of § 702—was commendable, and it arrived at the correct result. However, we believe the court employed an overly complex approach. In the face of unavoidable unconstitutionality, a court should hesitate before undertaking the quasi-legislative task of surgically altering an infirm statute. The better approach here would have been to strike § 702 in its entirety, leaving to Congress the delicate job of drafting a more narrowly-crafted exemption that would provide necessary protection for religious autonomy while avoiding establishment problems.[6] This approach is particularly appropriate where striking down the offending provision would leave intact a fully operative regulatory scheme, such as Title VII. *See Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 939-42 (1983); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976).

We believe that the Mormon Church, like all other religious groups, is entitled to assurances that government regulation will not interfere with its truly religious beliefs and activities. As we will show below in Part A, long-established First Amendment principles, as well as Title VII itself, provide protection for the Mormon Church and other religious groups comparable to the limited exemption

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[6] As Judge Wright wrote in *King's Garden, Inc. v. FCC*, 498 F.2d 51, 54-55 n.7 (D.C. Cir. 1974), discussing the § 702 exemption:

> While it is not uncommon for courts to come very close to rewriting statutes so as to save their constitutionality, the 1972 exemption is a poor candidate for such a salvage operation. The scope of a religious exemption is an issue raising very delicate questions of public policy. While it is reasonably clear that the 1972 exemption violates the Establishment Clause, it is far less clear exactly how much, or in what way, the exemption should be narrowed to avoid First Amendment objections. There may well be a considerable range of permissible alternatives. As a matter of institutional competence and constitutional authority, it is for the Congress, not the courts, to choose among these.

applied by the district court, fully adequate to protect religious liberty, and more firmly rooted in this Court's jurisprudence. We will then show, in Part B, that this Court should affirm the judgment below by applying these basic principles—many of which figured in the district court's analysis—to the undisputed facts of this case.

A. This Case is Governed By Long-Settled First Amendment Principles, Which Adequately Protect the Religious Liberty of the Mormon Church and Other Religious Groups.

Congress and the courts have recognized the importance of preserving the free exercise rights of all religious organizations, and have shaped the law of employment discrimination with sensitivity to possible infringement on religious liberty. While Title VII applies to religious organizations,[7] the statute itself recognizes that religious considerations are often, quite legitimately, a key factor in hiring by religious groups. For example, apart from the unconstitutional blanket exemption of § 702, Title VII contains a separate, more narrowly-drawn bar against government interference with a sensitive and central area of activity by religious organizations—religious education. 42 U.S.C. § 2000e-2(e)(2). *Cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502-04 (1979) (construing NLRB jurisdiction not to reach church schools, which serve key religious function).

The exemption for religious schools augments the statute's general provision that religious discrimination is lawful "where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). *See Kern v. Dynalectron*, 577 F. Supp. 1196, 1198-99 (N.D. Tex. 1983), *aff'd mem.*, 746 F.2d 810 (5th Cir. 1984).

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[7] It has long been settled that, as a general matter, Title VII may be applied to prevent religious organizations from discriminating against employees on the basis of race, sex, or national origin. *See, e.g., EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 286 (5th Cir. 1981).

The courts have also held that Congress did not intend that any of the prohibitions in Title VII apply to the relationship between a church and its ministers or minister-like personnel. By statutory construction, the case law has thus carved out another crucial area where government-dictated employment prohibitions might otherwise interfere with the fundamental right of a religious organization to determine its own matters of ecclesiastic policy and internal administration. *See, e.g., Pacific Press*, 676 F.2d at 1277-78; *McClure v. Salvation Army*, 460 F.2d 553, 560-61 (5th Cir. 1972). These cases dealing with racial and sexual discrimination would apply *a fortiori* to religious discrimination, which by definition is permitted in the hiring of clergy.

Therefore, by its own language and as construed by the courts, Title VII does not apply to discrimination by a religious organization within two of its most important spheres of religious activity—the hiring and supervision of ministers and minister-like employees, and the operation of religious schools—or in any setting where the religion of an employee is a *bona fide* occupational qualification.

Further protection for a religious organization seeking to avoid the application of Title VII is provided by well-established First Amendment principles. This Court has long barred governmental attempts to interfere with religious doctrine or internal church affairs. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 602 (1979); *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107-08 (1952). A related line of cases grounded on the free speech and free press clauses, in addition to the free exercise guarantee, protects the right of a religious group to choose who will speak for it and interpret its doctrine. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). *See also King's Garden, Inc. v. FCC*, 498 F.2d 51, 56 (D.C. Cir. 1974). Together, these two lines of cases provide a potent defense for any religious organization when a Title VII claim threatens to interfere with its fundamental religious liberty to establish doctrine, provide religious education, choose its ministers, or manage its internal religious affairs.

Most importantly here, the jurisprudence of the free exercise clause provides well-defined standards for the granting of an exemption from across-the-board application of government regulation, if that regulation threatens to create a burden upon the conscientious exercise of religious duty.[8] In order to make out a claim for a free exercise exemption, a party must demonstrate at the outset that government action creates a burden on the free exercise of a sincerely held religious belief, and, if the government can show that the challenged regulation serves a compelling interest, that the consequences of the requested exemption are outweighed by the religious claim. *See United States v. Lee*, 455 U.S. 252 (1982); *Thomas v. Review Board*, 450 U.S. 707 (1981).

This Court has held that in order to pass this threshold inquiry, the burden alleged must have more than a mere "impact" on a religious organization claiming an exemption; it must actually prevent the organization from observing its religious tenets. *Bob Jones Univ. v. United States*, 461 U.S. 574 at 603-04 (1983). This Court has distinguished between claims based upon "merely a matter of personal preference" and those flowing from "deep religious conviction." *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

In evaluating an alleged burden upon a religious organization's religious liberty, a court will of necessity inquire whether the claim is sincere and rooted in religious belief. *See id.* Because "[c]ourts are not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, this inquiry must stop short of second-guessing the *validity* of religious beliefs. Nevertheless, an objection interposed on religious grounds must be evaluated to determine whether it truly involves the compulsion of religious conscience. *See Bowen v. Roy*, — U.S. —, 106 S. Ct. 2147, 2153-54 (1986). "Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of

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[8] A religious organization may assert a claim for a free exercise exemption on behalf of its individual members, *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, —, 105 S. Ct. 1953, 1963 n.26 (1985), or on the basis of its own rights. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983); *Pacific Press*, 676 F.2d at 1279; *Southwestern Baptist*, 651 F.2d at 286.

ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interest." *Yoder*, 406 U.S. at 215-16.

These principles are hardly novel. They represent black letter rules that have emerged from this Court's many religion clause cases to shield any religious entity from governmental intrusion into its ecclesiastical hierarchy, its determination of religious doctrine, and its decisions regarding who shall speak for the group and disseminate its message to the world. These cherished principles also provide ample protection for the religious liberty of the Morman Church and any religious entity asserting a free exercise right to hire only co-religionists.

B. The District Court's Rejection of the Mormon Church's First Amendment Claims was Compelled by Settled Precedent.

Under the doctrines described above, and the undisputed facts found below, the district court's decision in this case was not only correct, it was compelled. Although the Court's analysis may have proceeded along unconventional lines, no other result can be justified.

At the outset, it is clear that the firing of a gymnasium building engineer implicates neither Title VII's exemption for religious schools nor the judicial interpretation of Title VII barring interference in the relationship between a church and its ministers or minister-like employees. No claim has been made that religion is a *bona fide* occupational qualification for employment at a gymnasium. Therefore, as an initial matter, Title VII applies to the situation at hand.

The uncontroverted facts described in the district court's opinion also defeat any First Amendment defense that could be asserted by the Church. The application of Title VII to the firing of Frank Mayson raises no danger of interference with the internal religious affairs of the Mormon Church, and creates no impermissible burden on the conscientious exercise of the Mormon faith.

As the district court found and as we noted earlier, the Deseret gymnasium, at which Mayson was employed, is open to the public and provides ordinary athletic facilities and services. *App.* at 14-15. More importantly, as the district court found:

> [T]here is no evidence or a contention that the religious tenets of the Mormon Church involve or require religious discrimination in employment. To the contrary, the Mormon Church, through one of its wholly owned subsidiaries, has stated that "it is 'morally evil' to deny anyone the right to employment." *In re Application of Chronicle Broadcasting Co.*, 59 F.C.C. 2d 335, 377 (1976). Furthermore, [defendants] do not contend and there is no evidence that engaging in physical exercise is a religious ritual of the Mormon Church, or that Deseret is used as a means of teaching or spreading the Mormon Church's religious beliefs or practices.

Id. at 15-16.

After reviewing the purely secular duties assigned to Mayson, the court concluded that "[n]one of those duties is even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration. Furthermore, none of those duties can potentially further any alleged religious activity in which Deseret may engage." *App.* at 17-18.

In applying its newly devised test, the district court on these facts found no nexus between either the primary function of the Deseret gymnasium or Mayson's particular job and the rituals or tenets of the Mormon Church. The court was not compelled to and did not in fact inquire into the validity or truth of any religious belief, nor did it inject itself into the Church's internal affairs, in violation of *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and its progeny.[9] Under the more traditional analysis outlined above in Part A, these same undisputed facts irrefutably bar any claim by Appellants that

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[9] Appellants' claim that the district court engaged in an evaluation of the validity of the Church's religious beliefs is utterly baseless. Appellants' characterization of the court's inquiry is also ironic in view of their accompanying suggestion that the judgment of the district court be reversed on the basis of the free exercise clause—a suggestion which invites the same entirely proper inquiry into the *nature*, but not the *validity*, of its allegedly burdened beliefs. Brief of Appellants at 18.

application of Title VII to Frank Mayson's firing interferes in any way with the religious doctrine or internal affairs of the Church.[10]

The undisputed facts of this case as found by the district court fall far short of stating a claim for a free exercise exemption. No burden has been shown on the Church's ability to provide religious education, to inculcate religious values or precepts, to observe religious practices, or to conduct internal Church affairs; the Mormon Church's desire to fire Frank Mayson on religious grounds is simply an arbitrary preference. Application of statutory equal opportunity requirements to the employment of a building engineer "does not in any degree impair [the Church's] freedom to believe, express, and exercise" its religion. *Bowen v. Roy*, 106 S. Ct. at 2152. As this Court observed in upholding the denial of tax-exempt status to a private religious university that discriminated on the basis of race, "denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not *prevent* those schools from observing their religious tenets." *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) (emphasis added).[11]

The circuit courts have similarly held that where discriminatory hiring practices are not compelled by any religious tenet, a free exercise burden cannot be demonstrated. *See, e.g., EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1279 (9th Cir. 1982) ("[E]nforcement of Title VII's equal pay provision does not and could not conflict with Adventist religious doctrines, nor does it

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[10] By contrast, activities implicating religious belief are amply protected by the well-settled doctrine articulated above in Part A. In a ruling not challenged on this appeal, the district court held that the Title VII religious exemption could constitutionally be applied to the firing of a truck driver employed by Deseret Industries, a branch of the Mormon Church's Welfare Services Department. The court found that Deseret Industries, in contrast to the gymnasium, is a religious activity with "intimate" ties to the tenets and beliefs of the Church. *App.* at 116. This holding demonstrates that the district court's approach provided adequate protection for the Church's religious activities. The more traditional approach that we advocate here provides no less protection.

[11] Even where a religious tenet is implicated, an indirect economic burden may not be sufficient to sustain a claim. *See Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). Where, as here, no tenet is burdened even indirectly, a free exercise claim must fail.

prohibit an activity 'rooted in religious belief.' *Wisconsin v. Yoder.*"); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 286 (5th Cir. 1981) ("Since the Seminary does not hold any religious tenet that requires discrimination on the basis of sex, race, color, or national origin, the application of Title VII reporting requirements to it does not directly burden the exercise of any sincerely held religious belief."). As the Fifth Circuit noted in *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980): "[T]he relevant inquiry is not the impact of the statute upon the [religious] institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs."

It is thus insufficient to allege, as Appellants do in their brief, that the challenged employment practices "are consistent with the Church's religious beliefs." Appellants' Brief at 20. The district court found, and Appellants do not contradict, that the operation of the Deseret gymnasium simply does not implicate any religious tenets of the Mormon Church; it is a voluntary commercial activity that may or may not be "consistent with"—but is certainly not *compelled by*—Mormon doctrine.

As this Court has held:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. 252, 261 (1982).

In choosing to open a gymnasium, the Mormon Church subjected itself to normal regulation of commercial enterprises. Only in limited circumstances—where it can demonstrate that a particular practice is compelled by conscience and is substantially burdened by governmental regulation—can a religious organization successfully allege that its free exercise rights in connection with such commercial activity are violated.

In light of the Mormon Church's failure to demonstrate any significant burden on a sincerely held religious belief, it is unnecessary to make any inquiry regarding the compelling governmental

interests served by Title VII or the inevitable weakening of these interests which would result from providing an exception for religiously-based hiring in connection with secular activities. *See Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, ___, 105 S. Ct. 1953, 1963 (1985). *See also* Point I, A, 1, *supra*. In this connection, however, this Court may take judicial notice of the overwhelming national interest in the vigorous and evenhanded enforcement of the civil rights laws.

In addition to undermining compelling public policy, an exemption for religious discrimination in these circumstances would itself run afoul of the establishment clause of the First Amendment. Religious exemptions are permitted when necessary to prevent a burden to conscientious religious observance created by "evenhanded" government regulation, and to allow the religiously observant to achieve equal footing with the non-observant. *See Thomas*, 450 U.S. at 719-20. To permit a broad-based exemption for religious discrimination in secular employment, as in this case, would give an unfair commercial advantage to religious entities in their conduct of ordinary commercial enterprises. *See Alamo Foundation*, 471 U.S. at ___, 105 S. Ct. at 1960-61.

The district court's conclusion that the application of Title VII would not cause a burden on any religious tenet of the Mormon Church was fully adequate under well-settled doctrine to defeat the Church's First Amendment claim at the threshold. Having correctly found that Congress could not constitutionally enact a wholesale exemption for religious organizations from prohibitions against religious discrimination in employment, and that the application of Title VII to the Mormon Church's operation of a public gymnasium in no way infringes upon the religious liberty of the Church or its members, the court appropriately entered summary judgment for Mayson.

CONCLUSION

The district court was correct in finding that the § 702 exemption has the primary effect of advancing religion, and therefore violates the establishment clause, because it provides to religious institutions doing business in the secular world substantial benefits that amount

to government sponsorship of religion. Appellants' attempt to avoid the consequent application of Title VII on the basis of a claim for a free exercise exemption fails because Mayson's continued employment as a building engineer in no way interferes with the Church's religious liberty.

Accordingly, *Amicus* urges that the judgment of the district court be affirmed.

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Nos. 86-179 and 86-401

Supreme Court, U.S.
FILED
FEB 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,

Appellants,

—v.—

CHRISTINE J. AMOS, *et al.*,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

—v.—

CHRISTINE J. AMOS, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND, THE NATIONAL COUNCIL OF JEWISH WOMEN, THE NATIONAL COALITION OF AMERICAN NUNS AND THE INSTITUTE OF WOMEN TODAY, *AMICI CURIAE*.

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INTEREST OF AMICI CURIAE[1/]

This brief amici curiae is submitted, pursuant to Rule 36.2 of the Rules of this Court, by the Women's Legal Defense Fund, the National Council of Jewish Women, the National Coalition of American Nuns, and the Institute of Women Today, and is filed in support of appellee Arthur Frank Mayson.

The Women's Legal Defense Fund is a non-profit, tax exempt membership organization founded in 1971 to provide pro bono legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an

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1/ The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

employment discrimination counseling program, and agency advocacy before the Equal Employment Opportunity Commission and other federal agencies charged with enforcement of the equal opportunity laws.

The National Council of Jewish Women ("NCJW") was founded in 1893. It is an organization made up of two hundred sections across the country which are active in advocacy and community service. NCJW is the oldest major Jewish women's organization in the United States and its members are volunteers dedicated in the spirit of Judaism to the advancement of human welfare and the democratic way of life.

The National Coalition of American Nuns is a Chicago-based organization of 2,000 sisters from religious orders throughout the United States. Founded 18 years ago, it is dedicated to studying, speaking about, and working for human rights and social justice.

The Institute of Women Today is a nationwide organization founded fourteen years ago by Catholic, Protestant, and Jewish women's groups. It is dedicated to a search for the religious and historical roots of women's liberation.

Amici believe that religious organizations should not be exempt from Title VII's prohibition against religious discrimination when they are engaged in secular activities. Singling out religious employers for a special exemption that does not apply to comparable employers in the non-profit or profit sector not only has the effect of preferring religious over other employers, but also significantly dilutes Title VII's protections against religious discrimination, has adverse implications for the employment rights of women, and impinges on employees' free exercise rights.

STATEMENT OF THE CASE

Introduction

Plaintiff Mayson is a building maintenance engineer in a public gymnasium owned and operated by the Church of the Latter Day Saints ("the Church").[2/] Because of a broad, prophylactic exception carved out by Congress to Title VII of the Civil Rights Act in 1972, and an analogous exception under Utah law, the Church claims it was legally entitled to require Mayson to choose between his religious beliefs and his job. But it is clear that, in granting statutory exemptions or any other legal entitlement, government may not burden the free exercise rights and interests of some in a constitutionally unnecessary attempt to accommodate the religious interests of others. It is

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[2/] Reference to the Church includes the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints.

irrelevant that a religious institution, and not the state, caused the harm to Mayson; the statutory exception itself, carving out different rules based solely on the religious status of the employer, demonstrates that this case involves more than merely private conduct. And the direct impact of the exemption on the free exercise rights of individuals like Mayson distinguishes the case from those involving free exercise claims which have no such effect. Compare Estate of Thornton v. Caldor, Inc., 105 S.Ct. 2914 (1985) (impact of statute on non-believers violates Establishment Clause) with Wisconsin v. Yoder, 406 U.S. 205 (1972) (no impact on identifiable non-believers).

Appellants' arguments, relying on the free exercise interests of the Mormon Church, and viewing the case as involving only private conduct, ignore the fact that any benefits accruing to the Church are obtained

in reliance on the statutory exemption and are received only at the cost of Mayson's free exercise rights.

Statement of the Facts

This case involves a church which, although not compelled to do so by its religious doctrine, has elected to own and operate a public gymnasium. The Deseret Gym ("Gym") solicits membership from the public at large, 549 F.Supp. at 801,[3/] through advertisements which do not refer to any religious affiliation, R.X1 at 42-44.[4/] Nothing about its operation suggests a religious character. In addition to traditional gymnasium facilities, this gym also offers many features of a modern health

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[3/] References to 549 F.Supp. 791 (D. Utah 1984), and 618 F.Supp. 1029 (D. Utah 1985), are to the published district court opinions in this case.

[4/] Citations to the record are to the volume number and page.

club or spa: barber and beauty shops, massage salons, and a snack bar. 594 F.Supp. at 801. Smoking is permitted in certain areas, id., even though religious doctrines of the Church prohibit tobacco for Church members, Brief For Appellants in No. 86-179 at 4 n.7 ("C.P.B. Brief"). The Gym has a history of employing non-Mormons and unobservant Mormons and continues to employ Gulmast Khan, a non-Mormon, as squash instructor and manager of the pro shop. R. II at 123; XI at 57, 162-63; III at 135-36.

Appellee Mayson was employed for sixteen years as a building maintenance engineer at the Gym. R.II at 121. There is no dispute that he performed his duties in a fully satisfactory, if not admirable, fashion. See 594 F.Supp. at 796, 802. His job entailed no religious duties, id. at 802, and no religious criteria had ever been imposed on Mayson until 1980, when he was informed that

he would be terminated if he failed to qualify for a "temple recommend."[5/] Mayson, a Mormon, objected to these requirements that, among others things, he attend church every Sunday and pay ten percent of his gross income as a tithe to the Church. He was fired when he refused to comply. 594 F.Supp. at 796.

Mayson filed charges of religious discrimination and subsequently filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., as amended ("Title VII"). The Church moved to dismiss or in the alternative for summary judgment, on the ground that the challenged employment practices were exempt pursuant to §702, 42

5/ Temple recommends are given only to members who tithe, attend church regularly, and abstain from coffee, tea, alcohol and tobacco. C.P.B. Brief at 4 n.7. The Church concedes that conditioning employment on temple recommends is not based on religious belief; instead, the requirement is merely "administratively convenient." Id.

U.S.C.§2000e-1, which provides, in pertinent part:

> This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Mayson principally contended that, as applied to him, the exemption violated the Establishment Clause because it had the effect of establishing or endorsing religious employers in their secular activities, while burdening his free exercise rights because it forced him to make a choice between his job and his beliefs.

On the basis of uncontested facts and affidavits, the district court made a factual finding that the Gym's "primary function is to provide facilities for physical exercise," and that "nothing in the running or purpose

of [the Gym] suggests that it was intended to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration." 594 F.Supp. at 800-01. The court also found that none of Mayson's duties was even tangentially related to any religious belief or ritual of the Mormon Church. Id. at 802. It therefore concluded that there was no evidence to even "remotely suggest" that a religious tenet of the Mormon Church necessitated Mayson's termination. Id. at 818.[6/]

Pursuant to these factual findings, the district court held that no free exercise rights of the Church were implicated in this

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[6/] In this connection, the court also noted that in an application for a broadcasting license, the Church had represented its belief to the F.C.C. that "it is 'morally evil' to deny anyone the right to employment...." In re Chronicle Broadcasting Co., 59 F.C.C.2d 335, 337 (1976). 594 F.Supp. at 818.

case and that no constitutional injury would result if the exemption from general employment discrimination prohibitions did not apply to Mayson's termination. The lower court then held that application of the exemption to Mayson would have a constitutionally impermissible effect of establishing religion, and ordered judgment for Mayson, including back pay. The Church did not oppose his reinstatement. 618 F.Supp. at 1029.

The Church essentially contended in the court below, as in this Court, that its pervasive religious doctrine infuses all its actions with religious significance and justifies the expansive exemption granted by §702. While there is no doubt that the Church and its adherents are fully entitled to a belief in the inseparability of the religious and the secular, the implications of this contention reach far beyond the

private sphere of belief and worship protected by the Free Exercise Clause. The Church is involved in a variety of activities which are ordinarily undertaken by secular, profit-making organizations, including radio and television broadcasting, commercial real estate, stock and bond investing, insurance underwriting, and agriculture. J. Heinerman & A. Shupe, The Mormon Corporate Empire, 46-125 (1985). In 1983, total assets of the Church were estimated to be 7.89 billion dollars.[7/] As the largest private property owner and one of the largest employers in

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[7/] J. Heinerman & A. Shupe, supra, at 125 (1985). The Mormon Church would thus rank thirty-second in assets on the list of "Fortune 500" industrial companies, ahead of Xerox Corporation, which had 7.66 billion dollars of assets on December 31, 1982. Fortune Magazine, May 23, 1983, at 22. Although the Mormon Church is obviously one of the "world's ... most economically prosperous religious organizations," N.Y. Times, February 11, 1987, at 20, col. 3, some other religious sects similarly have the wealth and inclination to acquire substantial pieces of the secular economy. See generally M. Larson & C. Lowell, The Religious Empire (1976); D. Robertson, Should Churches Be Taxed, 113-38 (1968).

Utah, the Church's extensive economic interests give it substantial control over the economic life of the state. Id. at 92, 122; M. Larson & C. Lowell, Praise the Lord for Tax Exemption, 203-09 (1969). The claim for exemption thus implicates large numbers of jobs with no religious content, except that invested by virtue of the Church's belief that religion should pervade its members' lives.

SUMMARY OF ARGUMENT

Had Mayson been employed by any other public gymnasium, unaffiliated with a church entity, his termination for failure to meet a religious test of faith would assuredly violate Title VII. That Act was intended to provide comprehensive protection against employment discrimination. Indeed, as revealed in the Congressional debates over both the current exemption, at issue in this

case, and its predecessor, an exemption from coverage for religious employers was promoted as constitutionally necessary to meet the free exercise interests of such employers. It is incontrovertible that religious employers engaged in religious activity have such interests which, even without a statutory exemption, are entitled to extraordinary deference under First Amendment standards. See, e.g., Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), cert. denied, 106 S.Ct. 3333 (1986). However, religiously-affiliated employers who undertake activities that have little or no relationship to spiritual or ecclesiastical concerns occupy a vastly different position with regard to any attempt to be relieved of the obligations imposed on all other similar employers.

If the Catholic Archdiocese of New York purchased the New York Yankees, would it be

entitled to fire all players who are not Catholic, or those Catholics who do not attend mass? The answer of the Mormon Church in this case would be yes. But it is clear that the First Amendment affords no such right and equally clear that the architects and enacters of the Title VII exemption did not contemplate its use in such a fashion. See Point I, infra. Even if they had, it would still be the province of this Court to hold that such a constitutionally unnecessary preference to religion results in both an impermissible establishment of religion and in the denial of free exercise rights of individuals, like Mayson, suffering from religious discrimination. The effects of the exemption on third parties, like Mayson, create an insuperable Establishment Clause barrier to application of the exemption in this situation, Estate of Thornton v. Caldor, Inc., supra, and other financial and symbolic

effects indicate that the exemption operates here to benefit and endorse religion. Tony and Susan Alamo Foundation v. Sec'y of Labor, 105 S.Ct. 1953 (1985). See Point IIA, infra.

Application of the exemption to secular employment by religiously-affiliated employers will not entangle government in religious matters, since secular employment by definition is not a religious matter. The determination as to what is secular and what is religious does not create an "entanglement" problem within the meaning of the Establishment Clause. It is the function and duty of courts and agencies, not unreviewable religious bodies themselves, to determine entitlements to exemptions and constitutional protections. That process inevitably necessitates an initial separation of the religious from the secular. This is the very essence of First Amendment jurisprudence and creates no entanglement problems as evidenced

by the numerous and various circumstances in which this Court has undertaken and upheld such inquiries. See Point IIB, infra.

The district judge was well within his discretionary power to award Mayson a "make-whole" back pay remedy. The award was not punitive but simply provided Mayson with wages actually lost as a result of his discriminatory termination. Its payment could cause no hardship to the Church, but its denial could severely affect Mayson. See Point III, infra.

ARGUMENT

I. THE RELIGIOUS EMPLOYER'S EXEMPTION UNDER TITLE VII WAS NEVER INTENDED TO AUTHORIZE THE KIND OF DISCRIMINATION WHICH OCCURRED IN THIS CASE, AND THE EMPLOYER IN THIS CASE HAS NO CONSTITUTIONAL ENTITLEMENT TO AN EXEMPTION FROM FEDERAL ANTI-DISCRIMINATION LAW

A. The Exemption For Religiously-Affiliated Employers Was Never Contemplated To Apply To Clearly Non-Religious Employment In A Public Gymnasium Merely Because A Church Owns The Facility

Title VII embodies a national policy to repudiate and eradicate the historical tolerance of discrimination in private employment on the basis of race, color, sex, national origin, and religion.[8/] Although

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[8/] For this reason, the Church's repeated invocation of the "first 175 years of our nation's history," (C.P.B. Brief at 12, 16, 41) is of little moment in this case, even though an "unambiguous and unbroken" historical practice has been sometimes important in the Court's Establishment Clause adjudication, Marsh v. Chambers, 463 U.S. 783, 792 (1983); see Walz v. Tax Commissioner, 397 U.S. 664, 678 (1970). Cf. Bob Jones University v. U.S., 461 U.S. 574, 604 (1983) ("the Government has a fundamental, overriding interest in eradicating racial discrimination in education--discrimination that prevailed, with official approval, (footnote cont'd)

religious employers, like other employers, are covered by Title VII's general prohibitions against discrimination on the basis of race, color, sex or national origin,[9/] Congress recognized that they required certain accommodation to their legitimate religious concerns and accomplished this in various ways. The statute originally exempted employees of a religious employer performing "work connected

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for the first 165 years of this Nation's Constitutional history").

9/ E.g., E.E.O.C. v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986); E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982); E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), cert.denied, 456 U.S. 905 (1982); E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981); Ninth & O Street Baptist Church v. E.E.O.C., 616 F.Supp. 1231 (W.D. Ky. 1985), aff'd mem., 802 F.2d 459 (6th Cir. 1986); Dolter v. Wahlert High School, 483 F.Supp. 266 (N.D. Iowa 1980); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F.Supp. 1363 (S.D.N.Y 1975); see Russell v. Belmont College, 554 F.Supp. 667 (M.D. Tenn. 1982) (Equal Pay Act); cf. McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). These cases reject the employers' contentions that application of Title VII to religious employers violates the Religion Clauses of the First Amendment.

with the carrying on ... of its religious activities." 42 U.S.C. §2000e-1 (1964) (emphasis added). Title VII also permits such employers to use religious criteria in their hiring practices whenever such criteria could be justified as a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise..." 42 U.S.C. §2000e-2(e)(1).[10/] In addition, the lower courts have uniformly declined to enforce Title VII standards to regulate the relationship between a church and its ministers or employees performing minister-like responsibilities.[11/]

[10/] The Church has never claimed that religion is a BFOQ for the job at issue in this case. Arguably, the BFOQ provision provides the only defense for the Church's discrimination against Mayson, since the exemption entitles them only to hire persons "of a particular religion," a qualification Mayson meets.

[11/] See Rayburn v. General Conf. of Seventh-Day Adventists, supra; McClure, supra.

In 1972, the exemption for religious employers was expanded by permitting them to employ persons "of a particular religion" in any of their activities. The exemption evolved from debates and proposals which focused largely on a comprehensive exemption for schools and religious employers. Amendment No. 815 to S.2515,[12/] proposed by Senators Ervin of North Carolina and Allen of Alabama would have exempted schools and religious organizations from all of Title VII's requirements. The sponsors of the amendment claimed that it was constitutionally required. Senator Ervin repeatedly adverted to the necessity to maintain a "wall of separation" between church and state, Leg. Hist. at 1217, 1221, 1231, and to keep the "political hands of Caesar" off all religious

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12/ H.R. 1746, P.L. 92-261, Committee Print prepared for the Committee on Labor and Public Welfare (1972), reprinted in Legislative History of the Equal Employment Opportunity Act (hereafter "Leg. Hist."), p. 881.

institutions. See, e.g., id. at 1230. Senator Allen likewise characterized the amendment as constitutionally necessary: "the constitutional standard is separation of church and state. And so far as interference with the 'free exercise' of religion, the separation must be full and complete. The first amendment prohibition is absolute." Id. at 1255.[13/]

Notwithstanding the claim that this comprehensive exemption was constitutionally required, the Senate rejected it by a vote of 55 to 25. Subsequently, the same sponsors offered another amendment, No. 809, which contained a substantially narrower exemption and was adopted as §702 with little

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13/ Sen. Allen was also particularly concerned about the impact of the Civil Rights Act on Southern schools. See Leg. Hist. at 853, 1254.

debate.[14] As a result, the legislative history, which is largely limited to the remarks of four senators,[15] and which primarily addressed the comprehensive exemption for all schools and religious employers and for all forms of discrimination, indicates little about the purpose of most legislators in accepting the narrower provision. What is clear from the debates was that the sponsors of the exemption urged it upon fellow legislators on the theory that it was constitutionally compelled. Clearly, the majority did not concur with regard to total exemption; it is unclear whether Amendment No. 809 was adopted because of

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[14] Virtually all the legislative history cited by appellants addressed the comprehensive amendment, No. 815, which was not enacted.

[15] Senators Ervin spoke at length and quoted lengthy opinions of this Court; Senator Allen spoke in general concurrence with Sen. Ervin. The sponsors of the bill, Sens. Williams and Javits, asked a few questions. Senator Stennis made a brief statement in opposition.

perceived First Amendment requirements or because of political compromise or other reasons.[16/] The debates display little or no recognition that establishment problems or free exercise concerns of employees might be implicated by an overly-solicitous accommodation for religious employers.[17/] Thus, the debates do not reflect how Congress would have balanced competing commands of the two Religion Clauses. Indeed, there was no

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16/ The assertion in appellants' briefs, C.P.B. Brief at 23, U.S. Brief at 21-22, that Congress may accommodate religion in ways which exceed the requirements of the Free Exercise Clause, as an abstract proposition, is not at issue here. There is no indication in the legislative history that that was the Congressional intent. While the proposition that accommodation may exceed free exercise rights may be generally true, it is, of course, not the case when that accommodation burdens free exercise rights of individuals and effectuates an establishment of religion. See Point IIA, infra.

17/ Senator Williams alone acknowledged that "it might very well be unconstitutional for Congress to permit such discrimination," referring to exempting religiously-affiliated public hospitals. Leg. Hist. at 1250. See also id. at 852 (similar comment by Sen. Williams in discussion of Amendment No. 809).

recognition that a religious employer might receive "unnecessary" benefits, tantamount to establishment, or that such an employer might use the exemption so as to deprive employees of their own rights of conscience.[18/]

Appellants posit that §702 was expanded in order to prevent entanglement of the EEOC and trial courts in determinations as to what constitutes "religious activity." This was

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[18/] Senator Ervin expressed his opinion that churches and religious employers were constitutionally entitled to complete exemption for their hiring activities, even for positions such as secretary or janitor. Leg. Hist. at 1223. The Senate rejected this proposition when it voted against the comprehensive amendment and voted to continue to impose the prohibition against race, national origin and sex discrimination. Even if this were not the case, the examples cited by Senator Ervin all involve actual employment by a church in its own usual activities (maintenance of church property and church fundraising). Nowhere in the legislative history of Amendment 809 is there a recognition of the possibility that churches might venture into activities which, as a result of history, tradition and common sense, can only be called secular. The closest example is Sen. Ervin's statement that he would exempt a distillery operated by a religious order. Leg. Hist. at 1230. This comment likewise occurred in discussion of Amendment No. 815, which was rejected.

not a Congressional purpose,[19/] nor has this kind of inquiry proved troublesome or entangling in fact. Judges and administrative personnel are frequently required to determine whether an activity is religious and therefore entitled to regulatory, statutory or constitutional protections. That inquiry is not only permissible, it is the very essence of First Amendment jurisprudence. Cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools, 106 S.Ct. 2718 (1986).

Title VII caselaw displays the relative ease with which constitutional parameters in this area can be, and have been drawn. The courts have evaluated claims for exemption arising in a variety of contexts. For

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19/ There is no reference in the legislative history to any actual entanglement problems arising from EEOC investigations or court cases. Prior to 1972, the only reported decision analyzing §702 was McClure v. Salvation Army, supra.

example, in E.E.O.C. v. Southwestern Baptist Theological Seminary, supra, the court carefully distinguished between those employed by a seminary who performed "minister-like" functions and those (such as support and administrative staff) who did not. 651 F.2d at 283-85. Indeed, the court found no First Amendment obstacle to requiring a church seminary to comply with relevant Title VII data compilation and reporting requirements for non-ministerial positions, even though the seminary had a demonstrated preference for having ordained ministers perform such functions. In E.E.O.C. v. Mississippi College, supra, the Fifth Circuit concluded that the "ministerial" exemption did not extend to all teachers at a religious college, whose employment was not strictly a matter of "ecclesiastical concern." 626 F.2d at 485. And in E.E.O.C. v. Pacific Press, supra, the

Ninth Circuit easily concluded that a secretary at a religious book publishing house was covered by Title VII. In these and other Title VII cases, the courts have emphasized the absence of any Establishment Clause obstacle to the limited involvement in religious affairs that the exercise of EEOC "jurisdiction" ordinarily entails. Each court concluded that, although applying Title VII in such contexts requires some church-state contact, there was no excessive entanglement involved in the record-keeping[20/] and single-incident investigations that are the most Title VII enforcement ordinarily requires.

20/ This Court recently held that similar or greater record-keeping and reporting requirements of the Fair Labor Standards Act do not generate undue church-state entanglement. Tony and Susan Alamo Foundation v. Sec'y of Labor, supra.

These and other cases[21/] indicate that courts and agencies may, and routinely do, separate the religious from the secular and evaluate claims of religiously-affiliated employers for exemption from laws and regulations. This process in the Title VII area in particular does not create excessive entanglement problems. No such concern motivated Congress to enact the exemption at issue here, nor, contrary to what the Church urges, would it justify an application of the exemption that has other constitutional infirmities.

21/ See Point IIB, infra, for a review of other areas in which courts and agencies examine religious exemption claims without problems of excessive entanglement by government in religion.

B. The Record In This Case Is Devoid Of Any Evidence That A Free Exercise Right Of The Church Will Be Violated If Federal Anti-Discrimination Law Is Applied To Mayson's Dismissal

"[T]he Free Exercise Clause's protection of religious beliefs and of the Church as an institution," C.P.B. Brief at 18, does not require an exemption from Title VII's prohibition of religious discrimination in this case. The Free Exercise Clause's protection for churches is broad but not unlimited. See U.S. v. Lee, 455 U.S. 252, 257 (1982). It encompasses the Church's freedom to carry on religious activities, to build churches and schools, conduct worship services, pray, proselytize, teach moral values, select its own leaders, define its own doctrines, resolve its own disputes, and run its own religious institutions.22/ In

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22/ See Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. (footnote cont'd)

essence, the focus of the Free Exercise Clause is on the right of the Church to interact with its adherents on matters relating to religion without state interference. The Free Exercise Clause does not require that "doctrines of religious belief [be] superior to the law of the land," Reynolds v. U.S., 98 U.S. 145, 25 L.Ed. 244, 250 (1879), and when a religious organization chooses to engage in "commercial activity," it must ordinarily follow the "statutory schemes which are binding on others in that activity." U.S. v. Lee, 455 U.S. at 261.

The district court found that there was no evidence to even "remotely suggest that the Mormon Church holds any religious tenet that requires all persons employed by its corporate entities in secular, non-religious activities to be templeworthy Mormons." 594

1373, 1388-1389 (1981) and cases cited therein.

F.Supp. at 818.[23/] A preference for employing observant Mormons may well be "consistent" with the Church's beliefs, C.P.B. Brief at 20, but that falls far short of a claim that such a practice is compelled by sincere religious conviction. It is only the latter situation which is entitled to deference under the Free Exercise Clause. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("to have the protection of the Religion Clauses, ... claims must be rooted in religious belief"); Tony and Susan Alamo

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[23/] The absence of any Church doctrine that compels religious preference hiring at the Gym is manifested by the thin evidence put forth by the Church. In its attempt to imbue the Gym with a religious aspect, the Church primarily relies on the 1910 dedicatory prayer. C.P.B. Brief at 7. To support its doctrine of individual self-sufficiency, the Church cites a 1936 Church Conference Report. Id. at 5. It is noteworthy that 1936 was an election year and that supporters of Alf Langdon used the just-announced Mormon plan of individual self-sufficiency, with its concomitant emphasis on refusal to accept government welfare benefits as a campaign tactic against the New Deal's government assistance programs. J. Heinerman & A. Shupe, supra, at 185.

Foundation v. Sec'y of Labor, 105 S.Ct. at 1963 (constitutional protection dependent on whether government "actually burdens the claimant's freedom to exercise religious rights").

The Church has never asserted this type of claim, 594 F.Supp. at 818, nor would such an assertion be persuasive. The Gym advertises without reference to its religious affiliation and it attracts both Mormons and non-Mormons. Patrons at the Gym may engage in conduct of which the Church disapproves on religious grounds, such as smoking. See 594 F.Supp. at 801. The Gym has a history of employing non-Mormons and unobservant Mormons; the imposition or enforcement of the requirement in 1980 that Mormon employees be eligible for a "temple recommend," was a clear departure from prior practice which was not supported or explained by reference to any doctrinal developments which necessitated

this change in the Gym's employment practices. Nowhere does the Church suggest that its members must attend the Gym, that such attendance constitutes a religious act, or that any religious significance gym attendance may have is destroyed or diminished by the presence of non-Mormon employees or employees ineligible for a "temple recommend." See 594 F.Supp. at 801. Indeed, as the district court found, the record lacks any evidence or explanation of its policy which would qualify it as a sincerely and deeply held religious conviction entitled to First Amendment protection.

II. THE TITLE VII EXEMPTION FOR RELIGIOUS EMPLOYERS AS APPLIED TO A BUILDING MAINTENANCE ENGINEER IN A PUBLIC GYMNASIUM VIOLATES THE ESTABLISHMENT CLAUSE AND ADVERSELY AFFECTS THE EMPLOYEE'S RIGHT TO FREEDOM OF CONSCIENCE

The Court has consistently accommodated both the "autonomy and freedom of religious bodies while avoiding any semblance of established religion," Walz v. Tax Commission, 397 U.S. at 672, by examining a statute's purpose, determining that its principal or primary effect is neither to advance nor inhibit religion, and assuring that the statute does not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); see Walz v. Tax Commission, 397 U.S. at 669.[24/]

[24/] The Lemon factors have been used by this Court as guidelines in at least 15 First Amendment cases. The only departures are in Marsh v. Chambers, supra (two centuries of an unbroken and unambiguous historical practice) and Larson v. Valente, 456 U.S. 228 (1982) ("strict scrutiny" standard applied to a statute which was patently discriminatory on its face).

The purpose of any Congressional attempt to accommodate religion is obviously religious to some extent, see Wallace v. Jaffree, 105 S.Ct. 2479, 2504 (1985) (O'Connor, J., concurring); but that is not enough to render a statute unconstitutional. Neither is it true, however, that every legislative attempt to accommodate religion must be deemed, because the purpose is laudable, to be per se constitutional. Rather, "[t]he solution ... lies ... in identifying workable limits to the government's license to promote the free exercise of religion." Id. Where, as here, the legislature exempts only religious entities and exceeds what was necessary to accommodate their legitimate free exercise interests, and the effect is to advance or endorse religious activities at the expense of the individual's freedom of conscience, fundamental Establishment Clause principles are affronted.

A. The Exemption Is Unconstitutional Here Because Of Its Effects On Mayson's Freedom Of Conscience And The Advantages Flowing To The Church

1. The Effect on Mayson's Right to Freedom of Conscience

This Court has on several occasions "identified the individual's freedom of conscience as the central liberty that unifies the various clauses in the First Amendment." E.g., Wallace v. Jaffree, 105 S.Ct. at 2487. As the facts of this case demonstrate, §702 enables employers to coerce religious loyalty from their employees in violation of fundamental First Amendment principles. Jefferson's famous "Bill for Religious Liberty," enacted in slightly different form by the Virginia Legislature in 1786, declared that "even forcing [any man] to support this or that teacher of his own religious persuasion" offends an individual's

right to freedom of conscience.[25/] Mayson was told he would lose his job unless he attended church and paid a tithe. See, e.g., Affidavit of Arthur Mayson, dated August 16, 1983. A religious employer's ability to coerce employees into religious observance through a religion-conscious statutory exemption constitutes an unconstitutional effect. See United States v. Lee, 455 U.S. at 261.

Only last year this Court held that a statute which has a similar impact on third parties has the effect of impermissibly advancing religion. Estate of Thornton v. Caldor, Inc., supra. Section 702 distinguishes between religious and nonreligious employers and employees and in so doing, seriously burdens the non-

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[25/] Cited in Everson v. Board of Education, 330 U.S. 1, 13 (1947); See L. Levy, The Establishment Clause: Religion and the First Amendment, 53-54, 58-60 (1986).

religious. Thornton teaches that religion may not be accommodated in an absolute manner that burdens others; when "[t]the State ... commands that ... religious concerns automatically control over all secular interests at the workplace," the Establishment Clause is violated. 105 S.Ct. at 2918.

The statutory infirmities recognized in Thornton are present here as well. That statute granted concrete benefits and preferred status to Sabbath observers, over all others. As a result, employees may well have been induced to become Sabbath observers in order to obtain this benefit, but those who, out of conscience, refused would be penalized in having their needs for time off considered last. Similarly, many of the Church's employees may well have yielded to the pressure to become "templeworthy" simply to keep their jobs. Those, like Mayson, who resisted as a matter of personal conscience,

have suffered loss of employment, an even more severe consequence than could have flowed from the Connecticut statute. Section 702 compounds the injury by granting preferences to religious employers, as well. They, like the Sabbath observers, enjoy a preferred status from which they reap concrete financial and competitive advantages. See Point IIA-2, infra.

This Court has upheld religious exemptions from laws of general applicability only when the exemption does not burden the religious liberty of others. Walz v. Tax Commission, supra; Gillette v. United States, 401 U.S. 437 (1971). While the exemption for non-profit organizations at issue in Walz may have required all non-exempt taxpayers collectively to shoulder additional tax burdens, it did not infringe their religious liberties. Similarly, upholding military service exemptions in Gillette for individuals with

religious or moral objections to war had no effect on the religious liberty of individuals with no such beliefs.

2. The Exemption Gives Religious Organizations Advantages Over Non-Religious Employers In The Secular Economy

As a direct result of the exemption for religious organizations, the Church is empowered to extract from employees substantial economic concessions. One of the reasons for Mayson's termination was his noncompliance with the Mormon Church's tithing requirement. There is no question of the Church's right to impose a tithing requirement--or any other requirement--on freely-consenting members. However, the ability to coerce the return of ten percent of an employee's gross income gives church-owned businesses an obvious competitive and financial advantage over non-religiously-owned ones. As this Court noted in Tony & Susan Alamo Foundation v. Sec'y of Labor,

supra, 105 S.Ct. at 1961, "the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors ... and the admixture of religious motivations does not alter a business's effect on commerce."

A statutory exemption which empowers employers to coerce obedience through economic threats offends a fundamental constitutional principle. The First Amendment is premised on the notion that each religion will succeed, not as a result of government pressures or inducements but on the intrinsic appeal of its beliefs to people who are free to choose. "We sponsor an attitude on the part of Government that... lets each [religious group] flourish according to the zeal of its adherents and the appeal of its dogma". Zorach v. Clauson, 343 U.S. 306, 313-14 (1952). This premise is undermined if secular employment becomes a

reward for the faithful. The potential for such abuse is apparent. See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., supra; Tony & Susan Alamo Foundation v. Sec'y of Labor, supra. Section 702 would expand the coercive powers of such employers. For example, the tithing requirement could reduce a minimum wage employee's wages below the statutory level. This may constitute an impermissible delegation of legislative authority, see Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), and would subvert this Court's ruling in Alamo. Even if the violation does not rise to that level, the examples demonstrate the power accorded religious employers under the exemption, a power denied other similarly situated employers.[26/]

[26/] The relative infrequency of cases like this one suggests that either the coercive power granted employers is highly successful, or that religious employers voluntarily forbear from exercising that (footnote cont'd)

The Church obtains approximately three-quarters--an estimated 1.5 billion dollars in 1983--of its income from the tithing requirement. J. Heinerman & A. Shupe, supra, at 102. Enforcement of that requirement is critical to the Church's continued economic growth. The §702 exemption thus gives this and other religious employers a powerful tool to expand their influence into secular economic activity, and correspondingly the political and social life of the community.27/

The Church's claim that it may not only discriminate on the basis of religion in all

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power, since it is not necessary to their religious integrity. Some support for this latter proposition can be found in the fact that thirty-two religious organizations opposed the Ervin-Allen proposal to exempt religious organizations from Title VII coverage altogether. Leg. Hist. at 1253.

27/ The danger is not confined to Utah or to this Church. Other churches and sects likewise have extensive economic holdings, or power in a particular community, and could decide to exercise their rights if the expansive interpretation of §702 is upheld.

its employment, but that it may impose religious criteria, other than membership, on employees or applicants, would increase the power of religious employers under §702 in a way which has particular relevance to the employment of women. For example, the Mormon Church actively encourages women to forego employment in favor of remaining at home to care for children,[28] it precludes women from acting as lay priests,[29] and it provides that only women whose husbands are members of the priesthood can enter the highest heaven. Id. at 227. One member was excommunicated by the Church in 1979, in part for her vocal support of the Equal Rights Amendment and criticism of the Church for its

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28/ J. Heinerman & A. Shupe, supra, at 227-29 (women encouraged in Church literature and by public speeches of church elders to assume traditional roles).

29/ Id. at 227. All observant male Church members over the age of 12 can be priests. Until 1978, blacks were denied entry into the priesthood, as women still are. Id. at 223.

opposition.[30] Just as Mayson was fired for failing to qualify for a "temple recommend," women could be fired from completely secular jobs for failing to adhere to sex discriminatory doctrines; important secular positions could be reserved for members of the priesthood, by definition male, or for those eligible to enter the highest heaven, and the like. In a state like Utah, a woman's employment opportunities would thereby be dramatically limited. If other fundamentalist religions took similar advantage of the broadly stated exemption, the employment opportunities of women could be significantly diminished[31]--all in the name of religious

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[30] Id. at 201-02.

[31] Some religious employers have already tried to fire new mothers on a religiously-based assertion that a mother of young children should not work outside the home. See Ohio Civil Rights Commission v. Dayton Christian Schools, supra. Other religious employers have cited biblical authority that the husband is the "head of household" to justify denial of fringe benefits to married female employees, E.E.O.C. v.
(footnote cont'd)

freedom, even where an employer has no constitutionally protectable right. For example, a nursing home owned by or affiliated with an Orthodox Jewish temple could fire nurses who did not participate in ritual baths.

As in Thornton, the exemption here singles out religious groups for special and absolute protection, and thereby "conveys a message of endorsement." 105 S.Ct. at 2919 (O'Connor, J., concurring). The exemption conveys a clear message of government facilitation and approval of practices which benefit and advance religion, by coercing religious loyalty and penalizing non-believers. The symbolic effects here

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Fremont Christian School, 781 F.2d at 1364, and have cited scriptures to rationalize hiring only males to teach religion courses, E.E.O.C. v. Mississippi College, 626 F.2d at 487 & n.12 ("pervasively sectarian" college owned by Baptist Church). See also E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d at 1275 (female employees of press owned by Seventh-Day Adventist Church paid less than male employees).

contrast sharply to those in Walz v. Tax Commissioner, supra, where the exemption from property tax did not single out religious organizations, but applied to all non-profit organizations.

B. Protecting Mayson Against Discrimination Will Not Cause Entanglement Problems

The Church proposes that the Lemon factors be abandoned in exemption cases in favor of an exclusive focus on entanglement. This unusual suggestion not only lacks precedent, but also fails to provide any meaningful "limits to the Government's license to promote the free exercise of religion." Wallace v. Jaffree, 105 S.Ct. at 2504 (O'Connor, J., concurring). Under this approach accommodation of religion would almost always be upheld, notwithstanding effects even of a constitutional dimension, because exemption would almost always be less entangling than regulation.

This approach cannot be reconciled with this Court's precedents. The proposal presumes that neutral rules which apply to religious groups, along with everyone else, are per se entangling and constitutionally infirm under the Establishment Clause. For instance, an exemption for religious groups that believed in human sacrifice from state criminal laws prohibiting murder would qualify under the Church's test. But see Reynolds v. U.S., 25 L.Ed. at 250. Exemptions for all religious organizations from minimum wage and other labor laws, regulations and codes would likewise survive scrutiny. But see Tony & Susan Alamo Foundation v. Sec'y of Labor, 105 S.Ct. at 1953.

Second, the Church's novel proposition, dubbed the "Walz-Gillette Analysis of Express Exemptions," C.P.B. Brief at 29, follows neither Walz v. Tax Commissioner, supra, nor

Gillette v. United States, supra. Although decided before Lemon, both Walz and Gillette analyzed the purpose and effect of the exemption as well as the potential for entanglement. Walz, 397 U.S. at 669; Gillette, 401 U.S. at 450. Walz sustained religious property tax exemptions in large part because the exemption was not explicitly based on religion but instead applied to a "broad class of property owned by nonprofit, quasi-public corporations...." 397 U.S. at 673. In Walz there was also a long historical tradition of exempting such property from property tax. Id. at 676-78. Moreover, Walz demonstrates that there are no entanglement problems in confining the Church's exemption to its religious activities: "[I]n Walz, the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship." Lemon v. Kurtzman, 403

U.S. at 614 (emphasis added). In Gillette the Court first found no sectarian purpose nor effect in a limited conscientious objector exemption, and only then discussed potential entanglement problems arising because of a perceived likelihood of fraudulent claims, i.e., that it would be impossible to separate political from religious objections to a particular war. The Court also expressed deference to Congress regarding its management of military affairs. Cf. Goldman v. Weinberger, 106 S.Ct. 1310 (1986) and Rostker v. Golberg, 453 U.S. 57 (1981) (deference to military).

The Church, in characterizing this as an "express exemption" case like Walz and Gillette, as to which it posits that entanglement considerations must prevail, attempts to categorize this case and the Court's precedents in a way which distorts both. It is telling that the Church has

failed altogether to cite Estate of Thornton v. Caldor, Inc., supra, one of this Court's most recent Establishment Clause cases and the case most similar in its facts to the present case. Thornton demonstrates that entanglement considerations are not necessarily paramount where accommodation to religion implicates other protected rights; where rights of third parties are infringed, the "effects" element of the Lemon analysis becomes critical: "this unyielding weighting in favor of Sabbath observers over all other interests ... has a primary effect that impermissibly advances a particular religious practice." 105 S.Ct. at 2918.

The Church's suggestion that any First Amendment exemption challenge should be resolved so as to produce the least government entanglement not only ignores the impact of the exemption on innocent third parties, see Point IIA-1, supra, but also

grossly overstates the difficulties associated with governmental evaluation of religious claims for exemption. Since at least 1886, as illustrated by Gibbons v. District of Columbia, 116 U.S. 404 (1886), which denied tax exemption to church-owned land, used not for religious purposes but rather to produce income, administrative agencies and courts have routinely distinguished between religious and secular activities of religious organizations. Indeed, the inquiry into whether religious organizations are operating in the religious or secular realm is performed in a wide variety of contexts.[32/]

[32/] See, e.g., Tony & Susan Alamo Foundation v. Sec'y of Labor, supra (applying Fair Labor Standards Act to commercial activities of religious entity); California v. Grace Brethren Church, 457 U.S. 393 (1982) (exemption from unemployment tax under 26 U.S.C. §3309(b) only when the organization is operated "primarily for a religious purpose"); Denver Post of the Nat'l Soc'y of the Volunteers of America v. N.L.R.B., 732 F.2d 769, 773 (10th Cir. 1984) (NLRB has jurisdiction over employees of religious hospital that (footnote cont'd)

This Court has never held that, for purposes of determining an entitlement to exemption under the First Amendment, the mere inquiry into whether an activity is religious or secular by itself constitutes excessive entanglement. The First Amendment does not authorize religious organizations to decide unilaterally that their activities shall be exempt from government regulation. In this, as in other closely analogous situations, it is the province of the courts, not of unreviewable church-related bodies, to determine "what the law is." Marbury v. Madison, 5 U.S. 137 (1803). See also United States v. Nixon, 418 U.S. 683 (1974) (jurisdiction of courts, not executive, to assess validity of claim of executive privileges).33/

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functions "in essentially secular fashion").

33/ Any other rule would improperly delegate the authority of the state to church officials. See Larkin v. Grendel's Den, Inc., supra.

Indeed, government routinely scrutinizes claims for religion-based exemptions arising from a myriad of circumstances without entanglement problems. See, e.g., Bob Jones University v. United States, supra (tax exemption for discriminatory private school); Wisconsin v. Yoder, supra (claim for exemption from compulsory high school attendance); Sherbert v. Verner, 374 U.S. 398 (1963) (exemption claim relating to unemployment compensation law requiring claimant to be available to work on Saturday); Welsh v. United States, 398 U.S. 333 (1970) (conscientious objector claim); Tony and Susan Alamo Foundation v. Secretary of Labor, supra (exemption from Fair Labor Standards Act); People v. Woody, 394 P.2d 813 (Cal. 1964) (exemption from state ban on the use of peyote). In such cases, when free exercise objections to facially neutral state requirements are advanced, courts and

administrative agencies necessarily inquire into, and make judgments concerning, the basis of the constitutional claim. See Thomas v. Review Board, 450 U.S. 707 (1981) and Sherbert v. Verner, supra (unemployment boards); Seeger v. United States, 380 U.S. 163 (1965) (local draft board).

Both N.L.R.B. v. Catholic Bishop, 440 U.S. 490 (1979) and Ohio Civil Rights Commission v. Dayton Christian Schools, supra, indicate that there is no excessive entanglement in the inquiry into "objectively ascertainable facts," Alamo, 105 S.Ct. at 1961, that determine entitlement to exemption (e.g., will regulation infringe a sincerely held religious belief? what are the countervailing state interests?). Entanglement concerns may, of course, arise if regulatory burdens are actually imposed so as to enmesh courts or agencies in the ongoing religious activity of an organization, see N.L.R.B. v.

Catholic Bishop, supra, or in matters of church doctrine or internal authority structure. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).[34/] However, the initial determination whether an employee is engaged in a "religious" activity for purposes of determining whether a statutory or constitutional exemption should apply is not per se entangling, as appellants contend. The alternative they propose is to allow religious organizations to be entirely self-policing, a proposition in fundamental conflict with First Amendment law. E.g.,

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34/ Although the Court has acknowledged the abstract possibility that inquiries arising in the course of enforcing asserted state jurisdiction "may" impinge on First Amendment rights, N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. at 502, it has never suggested that state jurisdiction cannot be invoked to inquire whether jurisdiction may be asserted. Moreover, the concern expressed in Catholic Bishop regarding the NLRB's remedial powers is inapposite here. The issue in this case is the constitutional authority to determine entitlement and exemption.

Tony and Susan Alamo Foundation v. Sec'y of Labor, supra; U.S. v. Lee, supra.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING MAYSON BACKPAY

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-421 (1975), this Court ennunciated a strong presumption in favor of backpay awards in order to make persons whole for injuries suffered on account of unlawful employment discrimination. In awarding Mayson backpay under the dictates of Albemarle, the district court properly exercised its equitable discretion to "make [him] whole."

The parties have stipulated that Mayson is entitled to $55,896 in wages, plus pension contributions. R. VI. at 139-42. Although this amount is substantial to a building engineer, it is inconsequential to the Church, which is blessed with vast resources

and in all likelihood has spent nearly that sum on attorneys' fees to contest the award.

The Church challenges the back pay award solely on the ground of its good faith.[35/] However, good faith is not a defense to a back pay remedy. Albemarle Paper Co. v. Moody, 422 U.S. at 422. And the exemption of section 713 of Title VII, 42 U.S.C. §2000e-12, applies only to the narrow and carefully circumscribed circumstances it addresses. In any event, it was not an abuse of discretion for the district court to award relief where no statutory provision precluded it expressly.

The Church attempts to undermine Title VII's make-whole mandate by citing City of Los Angeles Department of Water & Power v.

35/ The Church's good faith argument cannot even arguably apply to the period after the Court's January 11, 1984, decision adjudicating the unconstitutionality of Mayson's termination. Minimally, Mayson should at least receive back pay from this date.

Manhart, 435 U.S. 702 (1978) and Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983), rare departures from the ordinary remedial Title VII rule.[36/] In both these cases, however, which involved the unique circumstance of pension funds, the determining factor in the Court's ruling was the devastating effect on innocent third parties, and in Norris, on state and local governments, of ordering retroactive relief. Norris, 463 U.S. at 1105-1106; Manhart, 435 U.S. at 721-23. Here there are no similar equitable considerations because no third

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36/ In the few reported cases amici found in which individual prevailing plaintiffs like Mayson were denied backpay, there were independent reasons which justified denial. Sangster v. United Air Lines, Inc., 633 F.2d 864 (9th Cir. 1980), cert. denied, 451 U.S. 971 (1981) (upholding district court's decision denying backpay because plaintiff did nothing to mitigate damages); Harper v. General Grocers Co., 590 F.2d 713 (8th Cir. 1979) (upholding district court's denial of backpay because plaintiff failed to introduce any evidence of loss of earnings); Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978) (remanding for reconsideration district court's denial of backpay due to failure to mitigate damages).

party will be harmed by Mayson's back-pay award. Under the abuse of discretion standard, and to vindicate Title VII's mandate, Mayson's award should be upheld.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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* Thanks are extended to CUNY Law School students Suzanne S. Donsky and Melvyn L. Meer for their help in preparing this brief.

Nos. 86-179 and 86-401

Supreme Court, U.S.
FILED
FEB 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
and
THE UNITED STATES OF AMERICA,
Appellants,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Utah

BRIEF OF THE EMPLOYMENT LAW CENTER OF THE LEGAL AID SOCIETY OF SAN FRANCISCO AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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Nos. 86-179 and 86-401

IN THE SUPREME COURT OF THE
UNITED STATES

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INTEREST OF AMICUS

The Employment Law Center, the principal project of the Legal Aid Society of San Francisco, is nationally recognized for its expertise regarding state and federal laws prohibiting employment discrimination. It has pioneered the employment field for over a decade. It focuses on legal problems of disadvantaged people as they seek to secure and retain employment and represents those who find opportunity denied them for reasons other than their ability to do the job.

The Employment Law Center relies on community education, persuasion and, where appropriate, litigation to achieve its goals. Its expert staff are in demand as speakers; its newsletters reach over 5000 employers, employees, public policy makers and advocacy groups; and its attorneys are regularly consulted on

employment issues by other lawyers. The Employment Law Center also produces informational materials regarding equal opportunity laws which protect minorities, women and the disabled, including more recently victims of AIDS or ARC and cancer survivors. These publications have been requested by hundreds of public and private employers as well as the public.

In light of the expertise it has developed, the Employment Law Center also takes on difficult appeals and writes amicus briefs in significant cases. For example, the Employment Law Center has submitted amicus briefs to this Court in School Board of Nassau County, Florida, et al. v. Gene H. Arline (No. 85-1277), Atascadero State Hospital, et al. v. Douglas James Scanlon (No. 84-351), California Federal Savings and Loan Association, et al. v. Mark Guerra, Director, Department of Fair Employment and

Housing, et al. (85-494), Wygant v. Jackson Board of Education (No.84-1340), Board of Directors of Rotary International, et al. v. Rotary Club of Duarte, et al. (No. 86-421), Fort Halifax Packing Company, Inc. v. P. Daniel Coyne, Director, Bureau of Labor Standards, Maine Department of Labor, et al. (No. 86-341), and Meritor Savings Bank, FSB v. Vinson (No. 84-1979). As an organization concerned with securing full equality in employment opportunities whether the employer is the government, private-for-profit corporations, non-profit or religious organizations, the Employment Law Center has a strong interest in this case, and respectfully submits this brief in support of Appellees.

SUMMARY OF THE ARGUMENT

This action presents questions of substantial legal complexity with broad policy implications for religious

organizations, and, of particular concern to amicus, employees of such organizations. This Court is asked to decide whether the Constitution permits exemption for religious organizations from the generally applicable statutory prohibition against religious discrimination in secular employment. The parties will undoubtedly present the issues for decision fully and competently, and amicus does not intend to repeat the arguments they presented to the District Court. Rather, amicus offers this brief to provide the Court a workable analysis with which to scrutinize statutes that purport to accommodate religion and religious organizations.

Amicus submits that the Establishment Clause jurisprudence developed over the past 15 years should not be discarded in cases addressing the validity of accommodations of religion; the legal doctrines historically applied by

this Court provide a sound framework for deciding the constitutionality of such statutes. To be sure, if the test articulated by this Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), is applied woodenly to such provisions, demonstrably incorrect results may occur. Conversely, if the Lemon test is applied in a manner informed by previously developed constitutional principles, accommodation cases may be resolved consistent with the Court's other Establishment Clause decisions.

Our focus is on the first and second prongs of the Lemon test, which require that Section 702 (1) "have a secular legislative purpose," and (2) have a "principal or primary effect . . . that neither advances nor inhibits religion." Id. at 612. Section 702 meets neither requirement.

In applying Lemon's first prong, this Court has recognized that governmental attempts to accommodate religion by removing government-imposed impediments to religious belief or practice are secular in purpose because they promote the constitutional value of free exercise. Although the Court has never insisted that such accommodations be required by the Free Exercise Clause (see Walz v. Tax Commission, 397 U.S. 664, 674 (1970)), it has rejected claims of "accommodation" where the government-provided benefit to religion does not directly advance free exercise of religious belief. See Wallace v. Jaffree, 472 U.S. 38, 57-58 n.45 (1985). Section 702, as it relates to secular employees, is not a permissible religious accommodation because, definitionally, it removes no impediment to the free exercise of religious practice or belief. Hence

Section 702 has no permissible secular purpose and is unconstitutional.

Section 702 also fails under Lemon's second, effects test. Members of this Court and others have expressed unease with application of the effects test to accommodation cases because the "effect" of a true accommodation will always be to "advance" religion. But this valid observation does not justify ignoring the effects of accommodations altogether. Lemon also requires that government acts not have the effect of inhibiting religion. Moreover, this Court has long condemned statutes with the effect of advancing certain religions or religious beliefs at the expense of others.

Section 702 "accommodates" some religions (to the extent it does so at all) only by inhibiting the religious freedom of their secular employees. Such an "accommodation" clearly runs afoul of the

Establishment Clause and is particularly repugnant in light of the strong national policy to eliminate religious employment discrimination. Section 702 has the additional unconstitutional effect of advancing established, wealthy religions over less-established, unorganized, or economically unendowed sects. Section 702 gives wealthy religious organizations a tool to spread doctrine and expand membership that other religions simply do not possess, and may be prohibited by their doctrine from acquiring. Such an effect goes far beyond mere "disparate impact," for it touches on the very core concern of the Establishment Clause -- government neutrality toward competition among religious sects.

ARGUMENT

The topic of how to treat statutory provisions that seek to accommodate religion has received substantial attention from commentators and this Court in recent years. An "accommodation" is defined as an effort by the State to promote the free exercise of religion by exempting religious groups from otherwise applicable governmental regulations. See Wallace v. Jaffree, 472 U.S. 38, 57-58 n.45 (1985); id., 472 U.S. at 83 (O'Connor, J., concurring). So defined, there have been a number of cases in which the Court has addressed the constitutionality of religious accommodations under the Establishment Clause. See, e.g., Zorach v. Clausen, 343 U.S. 306 (1952) (allowing students to be released from public school to attend religious classes); Sherbert v. Verner, 374 U.S. 398, 409 (1963) (creating religious exemption from requirement that

recipient of unemployment benefits be willing to work Saturdays); Larson v. Valente, 456 U.S. 228 (1982) (exempting certain religious organizations from reporting requirements); Wisconsin v. Yoder, 406 U.S. 205, 234-35 n.22 (1972) (creating exemption from compulsory school attendance laws for Amish religion); Thomas v. Review Board, 450 U.S. 707, 719-20 (1981) (creating exemption from unemployment laws for individual who objects on religious grounds to munitions manufacturing).[1]

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1 In other cases addressing religious exemptions (see Brief for the United States at 20), the Establishment Clause issue was either not decided by the Court (Bowen v. Roy, ___ U.S. ___, ___ n.19, 106 S. Ct. 2147, 2158 n.19 (1986) (opinion of Burger, C. J.); United States v. Lee, 455 U.S. 252, 260 n.11 (1982); Braunfeld v. Brown, 366 U.S. 599, 608 (1961) (plurality opinion); Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979); St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981)), or the case did not involve a purely religious accommodation. Gillette v. United States, 401 U.S. 437 (1971) (exemption from (footnote continued)

From the decisions squarely addressing the Establishment Clause issue, certain fundamental principles have emerged. First, it is clear that where an accommodation is constitutionally required by the Free Exercise Clause, the State does not transgress the Establishment Clause by its enactment. See Sherbert; Yoder; Thomas. See also Catholic Bishop, 440 U.S. at 507 (statute construed to exempt religion in order to avoid potential conflict with the "Religion Clauses"). Moreover, the State may, under certain circumstances, exempt religion from governmental obligations even if such an exemption is not required by the Free Exercise Clause. Walz v. Tax Commission, 397 U.S. 664, 673 (1970). However, an accommodation that is not constitutionally

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military service for all conscientious objectors); Walz v. Tax Commission, 397 U.S. 664 (1970)(property tax exemption for all non-profit organizations).

required will violate the Establishment Clause if it has the effect of inhibiting religious belief (Sherbert, 374 U.S. at 409; Zorach, 343 U.S. at 311-12), or preferring certain religious sects over others (Larson, 456 U.S. at 244).

Reflecting the foregoing principles, and governing Establishment Clause jurisprudence generally, is the three-part test articulated by the Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under Lemon, in order to satisfy the requirements of the Establishment Clause, a statute must have a secular purpose, a primary effect that neither advances nor inhibits religion, and must not foster excessive government entanglement with religion. Lemon, 403 U.S. at 612-13. The Lemon test has been criticized by some members of this Court, particularly as applied to instances where the State purportedly seeks to accommodate the

religious practices or beliefs of certain groups by enacting religiously-based exemptions from general governmental obligations. Justice O'Connor has observed that "[b]y definition, such legislation [accommodating religion] has a religious purpose and effect in promoting the free exercise of religion." Wallace v. Jaffree, 472 U.S. at 82 (O'Connor, J., concurring). On the other hand, Justice Powell has noted that Lemon embodies "the only coherent test a majority of the Court has ever adopted." Wallace, 472 U.S. at 63 (Powell, J., concurring).

Amicus submits -- contrary to the argument of the Mormon Church and the implicit suggestion of the United States -- that there is no reason to abandon Lemon or to dilute its test in the context of accommodation cases. Rather, the test when viewed in light of the purposes of the Religion Clauses is well suited to

accommodation statutes. A statute that genuinely accommodates certain religious practices or beliefs should be construed as having a permissible purpose and effect, as long as it neither burdens the religious freedom of others, nor advances certain religious groups at the expense of others. So construed, application of Lemon leads to the conclusion that Section 702 constitutes an impermissible establishment of religion, and cannot be sustained.[2]

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2 In the event that an accommodation of religion has the effect of burdening the religious freedom of others, it may nevertheless be constitutional if required by the Free Exercise Clause. For example, it is arguable that the Free Exercise Clause demands that religious groups be allowed to discriminate on religious grounds in hiring clergy, and an exemption from Title VII limited to such circumstances would therefore not violate the Establishment Clause. By contrast, it cannot be maintained that an exemption from Title VII for non-religious employment is required to remove any impediment to the Free Exercise of religious practice or belief, a point which the United States apparently concedes. (Brief for the United States at 14.)

I. SECTION 702 IS NOT AN ACCOMMODATION BECAUSE IT DOES NOT PROMOTE THE FREE EXERCISE OF RELIGIOUS BELIEF

This Court has held that where the State exempts religion from otherwise generally applicable governmental regulations, and thereby seeks to accommodate the free exercise of religious practice or belief, such action does not necessarily transgress the Establishment Clause. See, e.g., Sherbert v. Verner, 374 U.S. 398, 409 (1963); Zorach v. Clausen, 343 U.S. 306 (1952). The reason that such provisions do not violate the "secular purpose and effect" requirements of Lemon is that when the state removes government-imposed obstacles to the unfettered practice of religion, it pursues the secular values inherent in the Free Exercise Clause of the First Amendment. See Wallace, 472 U.S. at 58 n.45.[3] See also,

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3 This is not to say that the only permissible (footnote continued)

Greenawalt, Religion as a Concept in Constitutional Law, 72 Cal. L. Rev. 753, 800 (1984) (accommodation "becomes more troublesome if a legislative body chooses to afford an exemption to persons who lack a free exercise entitlement to it").

Conversely, this Court has carefully refrained from sanctioning religious exemptions that do not remove any impediment to the free exercise of religion, but merely provide religion with a benefit not offered to a broader spectrum of secular groups. Thus, in Wallace, 472 U.S. at 58 n.45, the Court rejected the argument that Alabama's moment of silence law was a permissible accommodation, because it did not remove any government-

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accommodations are those required by the Free Exercise Clause; rather, the Court sometimes sanctions those accommodations that remove governmental obstacles to the free exercise of religious practice or belief, even if such accommodations are not constitutionally compelled.

imposed obstacle to the free exercise of religious practice or belief:

> In this case, it is undisputed that at the time of the enactment of [the statute in question] there was no governmental practice impeding students from silently praying for one minute at the beginning of each school-day; thus, there was no need to "accommodate" or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause.

Justice O'Connor similarly stated that only those exemptions that lift a governmental burden "on the free exercise of religion" qualify as genuine accommodations. Wallace, 472 U.S. at 83 (O'Connor, J., concurring) (emphasis added).

The reason for such a limitation is apparent; when the State removes an impediment to the exercise of religious practice or belief, the risk that a religiously-drawn classification will be

perceived as establishing religion is attenuated. Increasingly, this Court has recognized that such perceptions are of central importance in Establishment Clause analysis. For example, in Grand Rapids School District v. Ball, 473 U.S. 373, 105 S.Ct. 3216 (1985), the Court stated that

> an important concern of the effects test [of Lemon] is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices.

Ball, 473 U.S. at ___, 105 S.Ct. at 3226 (emphasis added). Similarly, in Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), the Court struck down a delegation of governmental authority to religious institutions in part because it provided "a significant symbolic benefit to religion in

the minds of some by reason of the power conferred." Id. at 125-26.[4] The danger of a perceived establishment of religion is at its apex when governmental benefits or burdens are distributed using explicitly religious criteria, as in the case of Section 702, because such classifications are most likely to convey a message that the State is aiding or abetting religion.[5]

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4 One commentator persuasively argues that Establishment Clause jurisprudence may be understood exclusively by reference to whether state action creates the appearance of church-state unity. Marshall, "We Know It When We See It," The Supreme Court and Establishment, 59 So. Cal. L. Rev. 495 (1986).

5 Numerous decisions of this Court have recognized that statutory provisions drawn along exclusively religious lines present serious Establishment Clause concerns. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 220-221 (1972) (exemption "from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause"); Widmar v. Vincent, 454 U.S. 263, 274 (1981) ("[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect"); Mueller v. Allen, 463 U.S. 388, 397 (1983) ("[m]ost importantly, the [benefit] is available for educational expenses incurred by all parents, (footnote continued)

Conversely, when the State removes an impediment to the free exercise of religious practice or belief, the perception will not be one of endorsement,

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(footnote continued from previous page) including those whose children attend public schools") (emphasis original); Walz v. Tax Commission, 397 U.S. 664, 673 (1970) (tax exemption granted to religious groups as well as "a broad class of property owned by nonprofit, quasi-public corporations"); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 518 n.11 (1979) (Brennan, J., dissenting) (an exemption "available only to church-operated schools, generates a possible Establishment Clause question of its own") (emphasis original); Committee for Public Education v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973) (suggesting that aid granted to religious schools might be constitutionally permissible if granted to broader spectrum of groups). See also Bagni, Discrimination in the Name of the Lord, 79 Col. L. Rev. 1514, 1547 (1979) (tax exemptions granted only to religious organizations would violate the Establishment Clause); Johnson, Concepts and Compromise in First Amendment Religious Doctrine, 72 Cal. L. Rev. 817, 878 (1984) (suggesting that Walz and Widmar may have reached different results if the benefits conferred had been narrowly directed at religion); Greenawalt, Religion as a Concept in Constitutional Law, 72 Cal. L. Rev. 753, 756-57 (1984) ("The 'suspectness' of religious classifications did not have to await judicial creativity; it has always been implicit in the religion clauses").

but of neutrality. See Wallace, 472 U.S. at 83 (O'Connor, J., concurring).

Strict application of the foregoing principles ensures that the courts do not sanction government subsidization of religion. If every religious exemption from government burdens were construed as an "accommodation" -- even those which did not remove an obstacle to religious practice or belief -- the State could constitutionally exempt religion from all obligations of citizenship, but none of the benefits. Such a naked subsidy of religion would plainly violate the purpose prong of Lemon; as noted above, this Court has indicated that the State may not exempt religion from all governmental burdens without violating the Establishment Clause. Yoder, 406 U.S. at 220 (warning of "the danger that an exception from a general obligation of citizenship on religious grounds may run

afoul of the Establishment Clause"). Therefore, the condition expressed by the majority and Justice O'Connor in Wallace -- that accommodations must facilitate the free exercise of religious practice or belief -- is a critical limiting factor.

Appellants argue that Section 702 promotes free exercise values because it removes governmental interference with religion. However, such an effect is, by definition, always present when the State exempts religion from governmental burdens. If it were sufficient to promote free exercise simply to exempt religion from secular obligations, the limiting language of Wallace -- that an "accommodation" lifts a governmental burden in order to promote the values articulated in the Court's decisions "interpreting the Free Exercise Clause" -- would be superfluous. Moreover, the formulation suggested by Appellants would sanction the exemption of religion

from all governmental burdens.[6] Thus, Congress could pass a statute exempting religion from anti-pollution laws, traffic regulations, and myriad other requirements, reasoning that this promoted free exercise values because it reduced government interference with religion. The reason that Appellants' argument leads to such a result is that it fails to distinguish between exemptions that remove burdens on religious practice or belief, and exemptions -- such as Section 702 -- that merely remove secular burdens from religious organizations. The former promotes free exercise values; the latter is nothing more than a gratuitous benefit for religious organizations.

The foregoing distinction has plainly been recognized by decisions of

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6 As will be demonstrated infra, Appellants' construction of the second and third prongs of Lemon ensures that all religious exemptions would pass constitutional scrutiny.

this Court addressing religious accommodations. Of the religious accommodations cited by the United States (Brief for the United States at 19-20), in each instance the approved religious exemption in fact facilitated free exercise by removing an obstacle to the practice of religion. For example, the exemptions created in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), were constitutionally required by the Free Exercise Clause in order to remove governmental barriers that interfered with the exercise of certain religious beliefs. Similarly, the release from public school classes in Zorach v. Clausen, 343 U.S. 306 (1952), allowed students the opportunity to pursue their religious education, an opportunity that was otherwise restricted by the requirement of full-time attendance at school. And the Sabbatarian exemption from Sunday Closing

laws approved in Braunfeld v. Brown, 366 U.S. 599, 608 (1961)(plurality opinion), facilitated the exercise of religion for those who would otherwise be forced to choose between their livelihood and their religious beliefs. See also United States v. Lee, 455 U.S. 252, 260 & n.11 (1982)(approving statute exempting those who objected on religious grounds to payment of social security); Bowen v. Roy, ____ U.S. ____, ____ n.19, 106 S.Ct. 2417, 2158 n.19 (1986) (opinion of Burger, C.J.) (approving exemption for individuals whose religious beliefs precluded use of social security number); Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918)(approving conscientious objector exemption).[7]

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7 NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979) and St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 788 (1981) were both decided on statutory construction grounds, and in each case there was a suggestion that interference

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On the other hand, the 1972 amendment to Section 702 did not remove any obstacle to the free exercise of religious practice or belief; by definition, it only exempted from Title VII employment which was non-religious in nature. If the Mormon Church could demonstrate a sincerely held religious belief that certain jobs could be performed only by those of the Mormon faith, an exemption from Title VII would promote the free exercise of religion. Such a situation would be analogous to an exemption from the Sunday Closing laws extended to Sabbatarians. By contrast, Section 702 does nothing to remove any impediment to free exercise; it merely removes secular burdens from certain religious organizations. Such an accommodation has a plainly religious

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with Church-run schools could violate the Free Exercise Clause.

purpose, and cannot be sustained under the first prong of the Lemon test.[8]

II. SECTION 702 HAS THE EFFECT OF ABRIDGING THE RELIGIOUS FREEDOM OF OTHERS, AND ADVANCING CERTAIN RELIGIONS AND RELIGIOUS IDEAS OVER OTHERS

Even if Section 702 is viewed as a genuine accommodation, it must nevertheless be invalidated because it has the effect of inhibiting religion. Certain

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8 Although Appellants will undoubtedly point to the property tax exemption upheld in Walz as an accommodation that failed to remove any obstacle to the exercise of religious practice or belief, the exemption sustained in that case was not limited to religion, i.e., it was not a "religious gerrymander." The Court was careful to point out that it was extended to a broad range of non-profit organizations. Walz, 397 U.S. at 673. See Johnson, Concepts and Compromise in First Amendment Religious Doctrine, 72 Cal. L. Rev. 817, 878 (1984)(Walz may have reached a different result if the benefits had been narrowly directed at religion). Moreover, the strong historical basis for tax exemptions for religion -- explicitly relied upon in Walz -- as well as the fact that such exemptions do not burden the religious liberty of others, suggests that such provisions are not analogous to Section 702.

accommodations, such as a Sabbatarian exemption from Sunday closing laws, have no adverse effect on the religious beliefs of others. Therefore, the exclusive religious effect of such accommodations is to lift a governmental obligation from religion, thereby promoting free exercise values. Other statutes, such as Section 702, purportedly accommodate the religious beliefs of some by restricting the religious freedom of others. No case cited by Appellants involved such an accommodation, but the decisions of this Court make clear that a religious accommodation achieved at the religious expense of others cannot be sustained unless constitutionally required by the Free Exercise Clause.[9]

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9 It is true that this Court has stated that "the government's authority to accommodate religion is not limited to the measures required by the Free Exercise Clause . . . ." (Brief for the United States at 17.) None of the cases cited for this proposition, however, involved a statute that accommodated the religious beliefs of some by burdening the religious liberty of others.

Although every accommodation has the effect of advancing religion, Appellants suggest no reason why this Court should relax the converse requirement of the effects prong of Lemon -- that the State may not pass a law that has the effect of inhibiting religion.

A. Section 702 Purportedly Accommodates Religion by Chilling the Religious Liberty of Others

Although this Court has never squarely decided the constitutionality of a statute that accommodates religion at the expense of the religious freedom of others, its decisions indicate that such accommodations would run afoul of the Establishment Clause. For example, in Sherbert v. Verner, 374 U.S. 398 (1963), the Court held that the Free Exercise Clause required that Seventh Day Adventists be excused from the requirement that persons seeking

unemployment benefits be willing to work Saturdays. In rejecting a claim that this accommodation violated the Establishment Clause, the Court observed that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties." Id. at 409. Conversely, in United States v. Lee, 455 U.S. 252 (1982), the Court refused to exempt on religious grounds an employer from the duty to pay social security taxes for its employees. The Court stated that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." Id. at 261. These pronouncements reflect the Court's particular concern that religious accommodations not burden the religious freedom of any individual in the name of promoting the free exercise rights of other groups.

In the case of Section 702, the most obvious burden placed upon religious freedom is that employees of religious organizations may be discharged for refusing to conform their religious beliefs to those of their employer. Compelling individuals to decide between their religious beliefs and gainful employment is a choice this Court has refused to sanction in the Free Exercise context. See Sherbert, 374 U.S. at 404 ("the pressure upon [appellant] to forego [her religious belief] is unmistakable"); Thomas v. Review Board, 450 U.S. 707, 717 (1981) ("coercive impact on Thomas" was the same as in Sherbert). While these cases involved a religious conflict imposed directly by the government, it is settled that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . . ." Engel v. Vitale, 370

U.S. 421, 430 (1962); Wallace v. Jaffree, 472 U.S. at 60 n.51; Abington School District v. Schempp, 374 U.S. 203, 221 (1963).[10] This principle reflects no more than the Court's recognition that effects not directly compelled by the State may nevertheless create a significant perception of endorsement of religion, a factor which distinguishes the

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10 Widmar v. Vincent, 454 U.S. 263 (1981), decided on Free Speech grounds, provides another illustrative analogy. In that case the University of Missouri provided meeting facilities for student activities, but prohibited religious groups from utilizing them. The Court found that although the University was under no obligation to provide such a forum, it could not constitutionally exclude religious groups once it had decided to do so, because of the chilling effect of such an exclusion on religious speech. Id. at 267. Just as the chilling effect upon speech in Widmar was sufficient to violate the Free Speech Clause, even though there was no element of governmental compulsion, Section 702's chilling effect upon religion need not be traced to governmental coercion in order to be judicially cognizable under the Establishment Clause. The United States' observation that Section 702 does not result in governmental coercion of religious beliefs (Brief for the United States at 29) is therefore inapposite.

proscriptions of the Establishment Clause from those of other constitutional prohibitions (such as the Free Exercise Clause).

Of course, at some point the effects of governmental action become too attenuated to be of Establishment Clause concern. The means by which this threshold may be defined is to distinguish incidental burdens upon religious freedom from direct burdens. In the case of Section 702, the burden imposed is not merely incidental to the goal the statute purports to achieve; that burden is a necessary consequence of the "benefit" Section 702 bestows upon religious organizations -- allowing them to discriminate against their employees. One commentator cited in both Appellants' briefs compares such a provision with religious exemptions from Sunday Closing laws:

> In contrast, the religious benefit [provided by an

> exemption from Sunday Closing laws] is obtained without regard to whether any injury is suffered by other parties. The injury is incidental to the benefit. Exempting Orthodox Jewish merchants from Sunday Closing laws may cause economic injury to their competitors, but the religious benefit does not depend on the injury.

McConnell, Accommodation of Religion, 1985 Sup. Ct. L. Rev. 1, 38-39 (1985). McConnell concludes that an accommodation whose benefit is dependent upon the sacrifice of the religious freedom of others is unconstitutional. Id. at 37-39. Dean Choper reaches an identical conclusion, again using the example of a Sabbatarian seeking to remain open on Sunday to illustrate a permissible accommodation. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 694-95 (1980). See also Paulsen, Religion, Equality and the Constitution: An Equal

Protection Approach to Establishment Clause Adjudication, 61 Notre Dame L. Rev. 311, 340 (1986) (primary concern is that an accommodation could result "in a violation of the religious liberty of those not so 'accommodated'").[11]

In contrast with Sabbatarian exemptions from Sunday Closing laws, Section 702 effectively requires employees of religious organizations to pay with their own religious liberty for the "accommodation" provided to their employers. The connection between benefit and burden is direct, and the perceived effect that government is favoring the religious freedom of some at the religious expense of others unavoidable. It is

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11 The particular Establishment Clause concern with accommodations that are made at the religious expense of others is that such a direct connection reinforces the perception of State sponsorship of religion. It is one thing if the State accommodates religion, but quite another if the accommodation depends upon a sacrifice of religious freedom by others.

difficult to conceive of an effect that presents a more direct contradiction of the values embodied in the Establishment Clause.

The impact of Section 702 is particularly troublesome because of the nature of the governmental obligation from which religious organizations are exempted -- the prohibition of employment discrimination. Where government exempts religion from taxation (as in Walz), the impact of the state action is less problematic than where the exemption is from a statutory prohibition that safeguards substantial individual rights. In the case of Appellee Mayson, the conclusion that the State has elevated secular benefits for religious organizations over Mayson's individual freedom to exercise his religious beliefs is one that inevitably flows from the intended operation of Section 702.

Moreover, Section 702 results in religious coercion even in the absence of private decisions by religious organizations to discriminate. The moment Section 702 was passed it created a chilling effect upon the religious freedom of every employee of a religious organization. The statute of its own force removed the protection against religious discrimination for all such employees, creating pressure to conform their beliefs to those of their employer, even if the employer had no present intention to practice religious discrimination. The loss of religious liberty is felt even by employees whose present religious beliefs conform to those of their employers, because Section 702 exerts a chilling effect upon the freedom to change one's religious convictions.[12]

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12 Even a significant non-religious burden imposed by a religious accommodation may violate the Establishment Clause. The "conscientious objector" exemption from (footnote continued)

The United States urges that Section 702's religious effects are not properly cognizable under the Establishment Clause because they are "not the result of

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military service addressed in United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970) imposed a non-religious burden upon those who were forced to serve in place of persons who invoked a conscientious objector claim. Only by a highly strained reading of the exemption did the Court reach the conclusion that it was not a religious accommodation, avoiding the need to address whether the secular burden upon others rendered the provision unconstitutional. This led commentators to the conclusion that a religiously-based exemption would have violated the Establishment Clause. See Greenawalt, Religion as a Concept in Constitutional Law, 72 Cal. L. Rev. 753, 760 (1984); Choper, Defining Religion in the First Amendment, 1982 U. Ill. L. Rev. 579, 589 (1982). See also Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (statute that sought to accommodate religion by placing a burden on others violates the Establishment Clause); McConnell, Accommodation of Religion, 1985 Sup. Ct. L. Rev. 1, 58 (1985) (excessive secular burden will render religious accommodation unconstitutional). If the imposition of a sufficiently significant secular burden results in an Establishment Clause violation, a fortiori the chilling effect of Section 702 on the religious freedom of individuals renders that provision similarly unconstitutional.

an affirmative grant of authority by Section 702 or any other federal statute." (Brief for the United States at 30.) It concludes that Section 702 merely returned religious organizations to the status quo prior to passage of Title VII, when private employers were free to discriminate on the basis of religion. (Id.) There are two fundamental flaws in this argument.

First, this Court has clearly stated that governmental coercion is not an essential element of an Establishment Clause violation. Engel v. Vitale, 370 U.S. at 430; Wallace v. Jaffree, 472 U.S. at 60 n.51. As amicus has previously discussed, the values protected by the Establishment Clause depend significantly, if not exclusively, upon perception. The perceived effect when Congress simply fails to address religious discrimination is fundamentally different -- for purposes of Establishment Clause analysis -- from the

perceived effect when Congress determines that religious discrimination should be unlawful, yet exempts religious organizations from statutory proscriptions.

Thus, the erroneous construction of the Establishment Clause that the United States offers is the inevitable result of the narrow focus it employs. When religious organizations are viewed in a vacuum, Section 702 appears simply to return them to the status quo prior to 1964. However, when viewed from the broader perspective demanded by the Establishment Clause, it is apparent that the situation after 1972 was radically different from that prior to 1964. In 1964, all private organizations were allowed to discriminate on religious grounds. After 1972, only religious organizations were allowed to do so. The perceived effect in terms of the State's

"establishment" of religion is substantially different.[13]

Moreover, as noted above, an "accommodation" merely exempts religious organizations (or individuals) from certain otherwise applicable governmental requirements. By definition, this returns such organizations to the status quo ante enactment of such governmental requirements. If, as the United States argues, a return to the status quo ante does not produce any judicially cognizable

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13 This factor distinguishes the Establishment Clause from the Equal Protection Clause, and renders Crawford v. Board of Education of Los Angeles, 458 U.S. 527 (1982) inapposite. Nevertheless, even under the Equal Protection Clause a return to the status quo ante may result in a finding of unconstitutionality. See, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967) (repeal of anti-housing discrimination statutes held unconstitutional); Washington v. Seattle School District No. 1, 458 U.S. 457 (1982) (initiative prohibiting the use of busing to achieve integration held unconstitutional). See also Widmar v. Vincent, 454 U.S. 263 (1981) (university under no obligation to provide forum for students, but having done so, may not exclude religious groups).

"effects" under the Lemon test, statutory accommodations will never violate the effects prong of the test; a priori, there will be no effects. Nor would the other two prongs of Lemon ever be violated under the analysis suggested by the United States. A bona fide effort to accommodate free exercise would not violate the purpose prong, and, according to the United States, would "invariably" be less entangling than denying an exemption for religion. (Brief for the United States at 18.)

The result would be that application of the Lemon test to religious accommodations would inevitably result in a finding of constitutionality. Presumably, under the theory advanced by the United States, the State could effectively subsidize religion by exempting religious organizations from all the burdens of citizenship -- while continuing to provide all of the benefits -- without

transgressing the Establishment Clause. Prior decisions of this Court plainly reject such a proposition; indeed, statutory provisions drawn along exclusively religious lines are inherently suspect. See Argument, supra. An interpretation of the Establishment Clause which automatically sanctioned all religious accommodations would render nonsensical this Court's admonition that it "must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause . . . ." Wisconsin v. Yoder, 406 U.S. 205, 220-221 (1972).

The rule that emerges from the foregoing analysis is that an accommodation that provides a benefit to religion, which benefit is dependent upon imposition of a burden on the religious liberty of others, impermissibly has the effect of inhibiting religion. It does not matter whether the

burden is imposed directly by the government, or whether government merely provides a benefit that may only be realized by deprivation of another's religious liberty through the inevitable forces of the private sector. In either case, the effect is to single out certain groups for preferential treatment at the religious expense of others, thereby creating governmental endorsement of the preferred groups, in violation of the Establishment Clause.

B. Section 702 Favors Certain Religions and Religious Ideas Over Others.

Section 702, although facially neutral, has the effect of favoring certain, mainly well-established, religious organizations and beliefs over others. These impermissible effects cannot be dismissed as "incidental" or a mere "disparate impact" on different religions.

They are objectionable because they cut to the heart of the Establishment Clause's concern with neutrality: that government action not favor any religions in their ability to spread their faith.

The premise that governments should be forbidden from favoring any religious sects or beliefs over others predates the republic and is fundamental to our national ideology. "Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference." Walz, 397 U.S. at 676-77 (emphasis added); see also Engel v. Vitale, 370 U.S. 421, 425-30 (1962). "[A]n attack founded on disparate treatment of 'religious' claims invokes

what is perhaps the central purpose of the Establishment Clause -- the purpose of ensuring government neutrality in matters of religion." Gillette v. United States, 401 U.S. at 437, 449 (1970); see also Walz, 397 U.S. at 669 ("[t]he basic purpose of these provisions . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited").[14]

This Court has consistently emphasized that it is impermissible for a state or the federal government to enact a law with the purpose or effect of advancing any religion or set of religious ideas at the expense of others. See, e.g., Everson v. Board of Education, 330 U.S. 1, 15

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14 Recognition that the command of government neutrality among religions lies at the core of the Establishment Clause reveals one of the fallacies in the Mormon Church's attempt to modify the test of Lemon v. Kurtzman, supra, in cases involving "accommodation of religious activities." See Brief for Appellants at 23-26. The test the Church suggests makes no provision for evaluating the neutrality of the challenged governmental act.

(1947) ("[n]either [a state nor the federal government] can pass laws which aid one religion, aid all religions or prefer one religion over another"); Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968) ("[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not . . . promote one religion or religious theory against another").

Appellants will doubtless contend that Section 702 is "neutral" because it applies to any "religious corporation, association, educational institution, or society."[15] But it is settled that the

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15 In this respect, this case is different from Larson v. Valente. There, the challenged statute made "explicit and deliberate distinctions between different religious organizations." 456 U.S. at 247 n.23. Moreover, the history of the statute demonstrated "that the provision was drafted with the explicit intention of including particular religious denominations and excluding others." Id. at 254. The Court held that under such circumstances -- intentional discrimination among religions

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First Amendment commands not only facial neutrality, but also that the effects of government action be neutral among religions.[16] See Gillette v. United

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(footnote continued from previous page) appearing on the face of a challenged statute -- application of the three-part Lemon test is unnecessary, although even then the Court proceeded to apply the test. Id. at 252-55. But where, as in this case, a facially neutral statute has a direct and significant effect of advancing some religions and religious beliefs over others, application of the "effects" test of Lemon is particularly appropriate.

16 Something of an analogy is provided by this Court's Equal Protection cases. In that context the Court has held that mere facial neutrality will not save a statute the impact of which is invidious discrimination. See, e.g., Hunter v. Erickson, 393 U.S. 385, 391 (1969) ("[a]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority"); Reitman v. Mulkey, 387 U.S. 369, 376 (1967) (invalidating facially neutral state constitutional provision because it "would encourage and significantly involve the State in private racial discrimination contrary to the Fourteenth Amendment"). Of course the analogy is not perfect because discriminatory purpose as well as effect is required for invalidity in the Equal Protection context (Washington v. Davis, 426 U.S. 229 (1976)), whereas, under Lemon, the Establishment Clause is violated by any law with either an impermissible purpose or effect.

States, 401 U.S. at 450 ("the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact") (emphasis added); Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion of Warren, C. J.) ("[i]f the purpose or effect of the law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect")(emphasis added); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, __, 105 S. Ct. 2194, 2918 (1985) (holding a statute invalid because it had "a primary effect that impermissibly advances a

particular religious practice")(emphasis added).[17]

Nevertheless, it is true that virtually every statute that provides benefits to religion will distribute such benefits unequally among various religious sects. Obviously, amicus does not contend that all such provisions have impermissible effects.[18] However, the non-neutral impact

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17 The requirement that the primary effects of government action be neutral among religions is also consonant with this Court's increasing focus on the role of perception in Establishment Clause analysis. See Argument supra. Such perceptions can, of course, be created just as easily (perhaps more so) by the tangible effects of government action, effects which are experienced by the public firsthand, as by statutory language or legislative purpose. Cf. School District v. Ball, 473 U.S. at ___, 105 S.Ct. at 3226-27; Lynch v. Donnelly, 465 U.S. 668, 692 (1983)(O'Connor, J., concurring).

18 As Justice O'Connor has observed,

> [a] statute that ostensibly promotes a secular interest often has an incidental or even primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the
> (footnote continued)

of state action is of central concern where it affects the ability of religions to spread their message and expand their memberships. See Zorach v. Clauson, 343 U.S. at 314 ("[t]he government must be neutral when it comes to competition between sects"); Gillette v. United States, 401 U.S. at 454 (statute valid because there could be no argument that it encourages membership in "putatively 'favored' religious organization"). As the Court stressed in Zorach -- in a passage frequently quoted by Appellants -- the Religion Clauses demand "an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its

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state could not criminalize murder for fear that it would thereby promote the Biblical command against killing.

Wallace v. Jaffree, 472 U.S. at 69-70 (O'Connor, J., concurring).

adherents and the appeal of its dogma." 343 U.S. at 313.

Statutes whose effects have a disparate religious impact are plainly of greater Establishment Clause concern than those whose effects are purely secular. See, e.g., Larson v. Valente, 456 U.S. at 246-47 n.6. For example, the tax exemption in Walz provided only certain religions with a secular benefit, but did not implicate the basic concern of the Establishment Clause's insistence on neutrality, because it did not have the effect of increasing membership in favored sects.[19] By contrast, the core concern of the Establishment Clause is implicated where a statute has the direct and primary

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19 The exemption from property taxes involved in Walz would clearly benefit those religious organizations owning much property more than those owning little. But this inequality has only the most attenuated and indirect effect on the relative abilities of religious organizations to compete among themselves for members or otherwise spread their doctrine.

effect of providing some religions or persons holding particular religious beliefs an advantage over others in spreading their doctrine and gaining new members, or conversely, in coercing the continued obedience of their present members.[20] Such non-neutral effects of government action go beyond mere "disparate impact" because the advantage they provide some religions directly disadvantages other, competing religions, thereby violating the Constitution's command that

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20 Although this Court's aid to parochial school cases involve affirmative state-provided benefits, they clearly reflect this distinction between generalized secular benefits, such as bus transportation, school lunches and public health facilities (state provision of which is permissible), and benefits that assist religious schools in indoctrinating religious belief (which are disallowed). For example, in Meek v. Pittenger, 421 U.S. 349 (1975), the Court found no infirmity in provision of "secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school" (id. at 364), but held that government "must be certain . . . that subsidized teachers do not inculcate religion." Id. at 369.

each religion "flourish according to the zeal of its adherents and the appeal of its dogma." Zorach, 343 U.S. at 313.

Applying the foregoing principles to Section 702, it is apparent that the statute cannot be sustained. The enactment of Section 702 substantially and unequally affects the ability of religions to spread their faiths. The statute provides established religious organizations with economic strength a powerful coercive tool for spreading their message, expanding their membership, and compelling obedience that competing churches simply do not have -- the ability to force employees of their secular business holdings to comply with their religious demands or be fired. This non-neutral effect of Section 702 can hardly be dismissed as insubstantial given the enormous financial holdings of many of the larger, established churches in this

country.[21] Indeed, the favoritism that Section 702 affords established religious organizations is graphically evidenced by the list of those organizations which have submitted amicus briefs in the statute's defense.

In the same manner, Section 702 discriminates against religious organizations that do not encourage, or that even abhor, accumulation of worldly wealth. Unlike the Mormon Church,[22] some

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21 The Mormon Church and its affiliates, for example, is a powerful economic force and a significant employer. One recent study of the Mormon Church concluded that "[t]he Church runs a virtual business empire, with assets close to $8 billion by conservative estimates." J. Heinerman & A. Shupe, The Morman Corporate Empire, 76 (1985). The Church controls a major communications conglomerate which includes three television stations and twelve radio stations (id. at 72-75), the largest ranching enterprise in the United States (id. at 119), a huge collection of commercial real estate holdings (id. at 121), and a group of insurance companies (id. at 123-24).

22 Scholars of Mormonism have commented on the theological motivation behind the Church's drive for economic expansion: "As religion

(footnote continued)

religions do not believe as part of their theology in accumulation of economic wealth either by the religious organization itself or by its members. Nor do all religions place such emphasis as does the Mormon Church (through the practice of tithing) on transfer of economic wealth from individual members to the organization. Section 702 puts the members of these religions at a distinct disadvantage in competition with religious organizations such as the Mormon Church and its affiliates which stress the accumulation of wealth in the church organization. For only religions that engage in such church-accumulation of economic power can use the Section 702 exemption to coerce the religious choices

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> and as dynamic organization, [the Mormon Church] is dedicated to 'this-worldly' change aimed at establishing a communally owned and operated business empire and a theocratically ruled, unified world society . . . . Thus economic growth is an integral part of Mormon theology." J. Heinerman & A. Shupe, The Mormon Corporate Empire, 77 (1985).

of secular employees. Religions whose beliefs leave wealth in the hands of their members (or who do not qualify as "religious organizations") cannot take similar advantage of their members' economic power.

Thus, Section 702 "effectively distinguishes between 'well-established churches'" with powerful financial resources "on the one hand, and 'churches which are new and lacking in a constituency . . .' on the other hand." Larson v. Valente, 456 U.S. at 247. It upsets the "free competition between religions" (id. at 245) anticipated by the Religion Clauses by making available to religious organizations a competitive instrument -- their power as employers -- which only some sects are able to wield.

Appellants may attempt to dismiss such effects as merely a return to the pre-Title VII status quo. However, as

demonstrated supra, every exemption of religion from governmental obligations may be characterized as having no effects other than a return to the status quo ante, yet this Court has never suggested that such exemptions have no judicially cognizable effects under Lemon. The perception of establishment of religion is far greater when the State legislates in a particular area, yet carves out special exemptions for religion, than when the State simply fails to act at all.

Moreover, Title VII as presently enacted -- including the current version of Section 702 -- gives certain religions a substantial advantage over groups with sincerely held religious beliefs that require discrimination but which do not qualify as "religious organizations." See State by McClure v. Sports & Health Club, Inc., 370 N.W. 2d 844 (Minn. 1985), app. dismissed sub nom. Sports and Health Club

Inc., v. Minnesota, ___ U.S. ___, 106 S. Ct. 3315 (1986) (born-again Christian owners of commercial health spas not entitled to discriminate on religious grounds). Section 702 also places religious organizations whose tenets do not call for a transfer of wealth from the individual to the organization at a substantial disadvantage. Thus, before 1964, all religious groups and organizations were equally at liberty to discriminate in employment. Now, only the economically powerful religious organizations are able to do so, and thereby increase their membership at the expense of other sects.

These effects cannot be dismissed as merely indirect or incidental. They are the primary results of a statute whose purpose is to exempt religious organizations from the otherwise generally applicable prohibition against religious

discrimination in secular employment. That exemption goes to the heart of the Establishment Clause's concern with neutrality -- the insistence that government actions be neutral when they affect the relative abilities of religions to compete in spreading their respective faiths. It is unnecessary for this Court to attempt to assess the magnitude of the competitive advantage which is such a direct and primary result of Section 702. For, as this Court stated in Abington School District v. Schempp, "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" 374 U.S. at 225.

CONCLUSION

The decision of the District Court should be affirmed.

February 20, 1987.

Respectfully submitted,

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Nos. 86-179 and 86-401

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, et al., and THE UNITED STATES OF AMERICA,

Appellants,

v.

CHRISTINE J. AMOS, et al.,

Appellees.

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, Robert E. Borton, being sworn, state that on this 20th day of February, 1987, three copies of the Brief of the Employment Law Center of the Legal Aid Society of San Francisco as Amicus Curiae in Support of Appellees in the above captioned case were mailed, in envelopes properly addressed and first class postage prepaid, to counsel of record for all

parties herein, to the Clerk of the United States Supreme Court, and to the Solicitor General, as follows:

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Supreme Court, U.S.
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Nos. 86-179 and 86-401

IN THE

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THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
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UNITED STATES OF AMERICA,
Appellant,

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CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Utah

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO AS AMICI CURIAE IN SUPPORT OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-179 and 86-401

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Utah

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO AS AMICI CURIAE IN SUPPORT OF APPELLEES

This brief *amicus curiae* is filed with the consent of the parties as provided for in the rules of the Court.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 91 national and international unions with a total membership of approximately 13,000,000 working men and women. The Service Employees International Union ("SEIU") is a labor union affiliated with the AFL-CIO which represents approximately 850,000 workers, principally in the service industries. A primary interest of the AFL-CIO and the SEIU is to secure employment opportunities for working people without regard to race, religion, sex or national origin, an interest that is threatened in part by the broad exemption now contained in § 702 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-1. The AFL-CIO and SEIU files this brief to argue that § 702's exemption of the non-religious activities of religious organizations from the ban on religious discrimination is inconsistent with the Establishment Clause of the First Amendment.

ARGUMENT

INTRODUCTION AND SUMMARY

From its enactment in 1964 until 1972, Title VII's ban on religious discrimination in employment applied to the non-religious activities of religious organizations; those institutions were afforded an exemption from the ban on religious discrimination only with respect to their "religious activities."[1] In 1972, Congress amended § 702 to remove the word "religious" as a modifier of "activities," thereby exempting religious organizations from the ban on religious discrimination as to "*all* their activities'. S. Conf. Rep. 92-681, 92d Cong., 2d Sess. 16 (1972) (emphasis added); *see also*, 118 Cong. Rec. 7167 (1972)

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[1] Throughout this brief we use "religious organization" and "religious institution" to refer to the category of institutions granted exemption by § 702, *viz.*, a "religious corporation, association, educational institution, or society."

(section-by-section analysis of bill reported by the conference committee).

As thus amended, § 702 allows religious organizations to discriminate in employment on the basis of religion even when those organizations operate commercial businesses for profit and would readily concede that the businesses do not constitute religious activity and that no religious tenet or belief calls for such discrimination. As Representative Erlenborn advised the House in discussing the conference report on the 1972 amendments to Title VII:

> [I]t was clearly the thought of the conference that if a religious institution is engaged in a profit making venture they still are not covered by the provisions of this act. [118 Cong. Rec. 7567 (1972)]

The practical impact of this amendment on the job opportunities of America's workers is substantial. While there is no comprehensive published accounting of the commercial enterprises operated by religious organizations, it is apparent from such information as is available that this phenomenon is widespread. *See generally*, A. Balk, *The Religion Business*, 8-11 (1968); M. Larson & C. Lowell, *The Religious Empire* (1976); S. Rep. No. 91-552, 91st Cong. 2d Sess., 1969 U.S. Code Cong. & Ad. N. 2096; H. Rep. No. 91-413, 91st Cong. 2d Sess., 1969 U.S. Code Cong. & Ad. N. 1692.

This Court's opinion in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 299 (1985), shows, to take one example easily at hand, that one small religious foundation operated 38 commercial businesses in four states, including "service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a record-keeping company, a motel, and companies engaged in the production and distribution of candy." *Id.* at 292 & n.2.

The Mormon Church, appellant in No. 86-179, has moreover, been reported to own and operate three television and twelve radio stations, a group of insurance

companies, a department store, a number of hotels, a tourist resort, 650 poultry and dairy farms, a sugar company, 30 canneries, a soap factory, a coal mine, a flour mill, and five salvage processing plants,[2] and to be one of the largest employers in Salt Lake City and the State of Utah.[3]

The Mormon Church, to be sure, states in its brief that the Church does not impose a religious preference with respect to employment in its profit-making activities (C.P.B. Br. 4). But the salient point here is that § 702 allows, and the Church would be free to practice, such discrimination were § 702 held constitutional. Nor, in any event, is there any assurance that other religious institutions have adopted policies as benign or that such policies would be continued were this Court, in contrast to the lower court decisions to date, to uphold § 702's expanded exemption.

The instant case involves a non-profit gymnasium, and the parties understandably have focused their discussions on that enterprise. But the holding sought by appellants —an unqualified affirmation of the constitutionality of § 702 in all its applications—involves considerations that transcend the facts of this case.[4] While, as we explain

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[2] J. Heinerman & A. Shupe, *The Mormon Corporate Empire*, 46-124 (1985); M. Larson & C. Lowell, *Praise the Lord for Tax Exemption*, 203-210 (1968).

[3] J. Heinerman & A. Shupe, *supra*, at 92.

[4] As stated in the Brief of the United States, at (i), the question presented is:

> Whether Section 702 . . . is invalid under the Establishment Clause of the First Amendment to the extent that it exempts the secular activities of [religious] organizations from the prohibition against religious discrimination.

The Mormon Church, in its brief, at (i), states the question with equal breadth:

> 1. Whether Congress acted unconstitutionally when it amended [§ 702] . . . to permit religious employers to hire only members of their own faith, regardless of the nature of the employment activity . . . .

herein, we believe § 702 unconstitutional in its exemption of this gymnasium, a major purpose of our brief is to underline the broader ramifications of § 702's exemption of commercial enterprises of all kinds owned by religious organizations.

Preliminarily, we wish to make clear that we do *not* suggest the exemption originally enacted in 1964 suffered from any constitutional infirmity. The exemption of "religious activities" of religious institutions from a statutory ban on religious discrimination is plainly required in some instances by the Free Exercise Clause, and in all instances is appropriate "to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" *Gillette v. United States*, 401 U.S. 437, 453 (1971), quoting *United States v. Macintosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting). The same is not true, however, when Congress extends the exemption to nonreligious activities.

We begin our analysis by addressing the United States' contention (U.S. Br. at 37-38) that the Establishment Clause is not implicated at all in this case, because there is no "state action." The United States asserts that a congressional decision "not to exercise its regulatory authority . . . cannot offend the Establishment Clause" (*id.* at 38). But as we show at pp. 7-9, this Court has repeatedly rejected the notion that the Establishment Clause does not reach religious exemptions from general government-imposed norms. The central purpose of the Establishment Clause is to assure government *neutrality* respecting religion. The exemption of religious organizations from a statutory obligation imposed upon all secular organizations is, on its face, a departure from that neutrality, and its permissibility under the Establishment Clause thus turns on whether there exists an adequate secular justification vindicating the differential treatment.

We then turn to the three "secular" justifications for the blanket § 702 exemption advanced in appellants' briefs. At pp. 9-12, we demonstrate that the Mormon Church's contention that the Free Exercise Clause *requires* this sweeping exemption—a contention disclaimed by the United States—is without merit. With respect to most of the non-religious activities of religious institutions, the threshold requirement for invoking the Free Exercise Clause—a showing that the governmental regulation collides with religious belief or practice—will be wholly absent. Indeed, in this case the district court stated that it had not even been contended, let alone shown, that employing non-Mormons or non-observing Mormons in the gymnasium would conflict with any religious tenet of the Church.

This same consideration impeaches the second theory advanced in defense of § 702: that the exemption, even if not required by the Free Exercise Clause, is an allowable accommodation of "free exercise values," freeing religious belief or practice from the burdens that government regulation otherwise would impose. As we show at pp. 12-16, that justification for non-neutrality requires, at the threshold, a demonstration that absent the exemption the government regulation would conflict with religious belief or practice. And here, as in most cases of non-religious activity, that threshold is not present.

The final justification asserted by appellants for the blanket exemption in § 702 is that it avoids the "entanglement" between government and religious institutions incident to resolving disputes over whether particular activities are religious or secular, and avoids as well the risk that erroneous resolutions of such disputes will impinge on true religious activity. But as we show at pp. 16-20, whatever the legitimacy of these concerns in marginal cases, § 702's exemption is vastly overbroad in relation to these concerns. For a vast array of commercial enterprises run by religious organizations,

the conclusion that the activity is secular will be crystal-clear and likely not disputed. And the religious-secular line has already been determined for most activities of religious institutions by virtue of other tax and employment statutes whose exemptions—like that in the 1964 version of § 702—apply only to religious activities. There will thus be relatively few instances where the ban on religious discrimination in Title VII would generate a dispute over this line of demarcation. Against this background, § 702's general exemption in favor of *all* the activities of *all* religious institutions cannot be justified by concerns that are applicable only in *marginal cases* and that could be dealt with (as we show) by techniques that cut less deeply into core Establishment Clause values.

I. THE ESTABLISHMENT CLAUSE REACHES RELIGIOUS EXEMPTIONS FROM GOVERNMENT-IMPOSED NORMS

The United States contends that the complete answer to the Establishment Clause challenge to § 702's blanket exemption for religious organizations is that the freedom of such organizations to discriminate is "not the result of an affirmative grant of authority by Section 702 or any other federal statute" (U.S. Br. 37).

> Prior to the enactment of Title VII, *all* private employers were free to discriminate on the basis of religion; Section 702 simply exempts religious organizations from the antidiscrimination requirement of Title VII . . . . Since Congress' failure to prohibit discrimination prior to 1964 did not constitute an establishment of religion, its decision not to prohibit such discrimination now cannot offend the Establishment Clause. [*Id.* at 37-38, emphasis in Br.]

This argument overlooks the singular role of the Establishment Clause. Congress' choices respecting exemption from general government-imposed obligations are

ordinarily of no constitutional moment, but when the exemption runs exclusively to religious institutions the situation is quite different.

The "central purpose of the Establishment Clause" is "ensuring government neutrality in matters of religion." *Gillette*, 401 U.S. at 449, *viz.*, "to insure that no religion be sponsored or favored", *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). In consequence, "[t]he Court must not ignore that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause," *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). "[T]he Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders', as well as obvious abuses." *Gillette*, 401 U.S. at 452.[5] When government, by exemption, frees religious institutions to engage in practices that are forbidden to all others in our society, the interests protected by the Establishment Clause are directly implicated:

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of endorsement . . . of religion, a core purpose of the Establishment Clause is violated. [*Grand Rapids Dist. v. Ball*, —— U.S. ——, 105 S. Ct. 3216, 3226 (1985)].

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[5] The Court's approach in *Walz* and *Gillette, supra*, is sufficient to demonstrate that the United States' thesis is wrong. If the exemption of church property devoted to religious purposes from a general property tax is constitutional on the simple ground that there is no government action, the Court would have had no occasion to undertake the detailed and sensitive inquiry that ultimately guided its decision in *Walz*. See also *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette, supra* (confronting the constitutionality of statutes granting exemption from military conscription to conscientious objectors).

Accordingly, an Establishment Clause inquiry is triggered by the creation of an exemption which has the effect of permitting religious institutions to act in the secular world in ways that are denied to all secular institutions. That inquiry is whether there exists "a neutral, secular basis for the lines the government has drawn." *Gillette*, 401 U.S. at 452.

II. THERE IS NO ADEQUATE SECULAR JUSTIFICATION FOR THE EXTRAORDINARY PRIVILEGE PERMITTED RELIGIOUS INSTITUTIONS—BUT NO OTHERS—BY THE EXPANDED § 702 EXEMPTION

The exemption accorded by the original § 702 had a plainly secular justification, *viz.*, protection of free exercise rights. The religion of those who carry out the "religious activities" of religious organizations is obviously central to the free exercise of religious belief and practice. See p. 5, *supra*.

But when religious institutions expand their activities into the secular world, the justification for a § 702 exemption is not self-evident. The activity is by definition not religious in nature, and most often employment on the basis of religion will not be dictated by religious tenet. On what basis, then, can the government's allowance to religious organizations alone of a license to engage in employment discrimination be justified? The briefs of appellants proffer three justifications. We address these in turn and show that none constitute adequate secular justification for the privilege accorded to religious institutions—but to no others—by the expanded § 702.

A. The Blanket Exemption in § 702 Is Not Required By the Free Exercise Clause

The Mormon Church contends that the Free Exercise Clause precludes government bans on religious discrimination in the secular activities of religious organizations (C.P.B. Br. 17-32). According to the Church, as "gov-

ernment clearly can legislatively authorize any conduct which the Free Exercise Clause would compel the government to leave unregulated", the authorization here "cannot constitute an establishment of religion" (C.P.B. 17-18). The United States expressly disclaims any reliance on this theory—"We do not assert that the amendment of Section 702 to encompass all activities of religious institutions was required by the Free Exercise Clause" (U.S. Br. 17)—and with good reason. In the vast majority of cases, including *this* case, a ban on religious discrimination in the secular activities of religious organizations does not raise even a colorable free exercise claim.

"Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Board*, 454 U.S. 707, 713 (1981). Thus, a statute cannot violate a claimant's free exercise rights "unless, at a minimum," compliance with the statute would "actually burden[] the claimant's freedom to exercise religious rights." *Tony and Susan Alamo Foundation*, 471 U.S. at 303. *See also, Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *United States v. Lee*, 455 U.S. 252, 256-257 (1982).

Except, then, where a religious organization's tenets dictate religious hiring even in purely secular activities, a ban on religious employment discrimination in secular activities does not generate the threshold requirement for a free exercise claim. For the religious organization could not demonstrate the "minimum": that compliance with that ban would violate religious beliefs or conflict with religious practice. Thus, conformity to the Free Exercise Clause cannot constitute a justification for § 702's present blanket exemption for all secular activities of all religious organizations.

Indeed, what we have said to this point disposes of the free exercise claim on the facts of the instant case.

The gymnasium in this case operates like any other gymnasium in our society, and performs no religious mission; albeit on a non-profit basis, the facility competes for the general public's patronage against like facilities that are operated by others for profit. The district court's opinion states that "there is no evidence *or a contention* that the religious tenets of the Mormon Church involve or require religious discrimination in employment" (J.S. App. 15a; emphasis added), and "[n]one of the affidavits submitted even remotely suggest that the Mormon Church holds any religious tenet that requires all persons employed by its corporation in secular, non-religious activities to be templeworthy Mormons" (*id.* 54a).[6]

Of course, it is possible that future cases may arise in which a religious organization *does* have a religious tenet requiring the employment of only its members in secular activities. Whether Congress is required by the Free Exercise Clause to grant *such* an employer an exemption from Title VII's ban on religious discrimination is a more complex question. As that question is not presented here, we go no further then to note the principles that would govern its disposition. In such a case, as there would be a conflict between government regulation and religious belief, the inquiry would advance to the second stage, which requires balancing the interest in fidelity

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[6] The Mormon Church contends in *this* Court—but apparently not in the court below—that its religious discrimination against appellee Mayson *was* dictated by a religious tenet (C.P.B. Br. 4-5, 19-20). We are advised that appellees will respond to that contention at length, and do not undertake to duplicate that showing here. It is sufficient to observe that ambiguous and carefully guarded affidavits claiming that employment of Church members is "consistent with" Church doctrine (C.P.B. Br. 5), and that because salaries of gymnasium employees are paid "primarily" by Church members "[t]he Church believes that it should benefit members with employment possibilities in which these contributed funds are expended" (*id.* 4) are not claims that such religious discrimination is *required* by religious tenet.

to the organization's religious tenets against the governmental interest in eliminating employment discrimination. This Court's decisions show that the government's interest in banning employment discrimination is of the highest order and that free exercise interests are entitled to their least weight when they are transported to the commercial arena and the consequences are felt by employees:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. [*United States v. Lee*, 455 U.S. at 261].

It thus appears that a ban on religious discrimination would withstand a free exercise challenge even from a religious organization acting as a secular employer whose discrimination in secular employment is based on a religious tenet. But whatever the outcome in *such* a case, the Free Exercise Clause plainly does not justify the sweeping exemption in § 702 which licenses religious discrimination by religious institutions *whether or not* that discrimination is based on a religious tenet.

B. The Blanket Exemption in § 702 Cannot Be Justified As a Permissible Accommodation of Religious Practice or Belief

What we have said to this point indicates as well the fallacy in the second justification proffered by appellants: that even if the § 702 exemption for the secular activities of religious organizations is not compelled by the Free Exercise Clause, Congress was free to enact that exemption in order to accommodate "free exercise values." The accommodation principle comes into play when a law of general applicability collides with some citizens' religious practices or belief, but despite that collision the Free

Exercise Clause does not oblige the government to grant an exemption. In that setting, this Court has ruled that the government need not inevitably trample religious practice or belief simply because it is constitutionally empowered to do so, and accordingly may, in appropriate circumstances, adjust its secular legislation to mitigate the intrusion on religious practice or belief, *viz.*, to accommodate "free exercise values" by avoiding "unnecessary clashes with the dictates of conscience." See *Walz, supra; Gillette, supra; Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (dictum).

The tenets of most religious organizations do not require religious hiring in secular employment. Where that is true the threshold for accommodation—a governmental desire to lift the burden that generalized legislation otherwise would impose on *religious belief or practice*—is absent; there is, *as to them*, no free exercise value to accommodate. Accordingly, § 702's blanket exemption for all secular activities of all religious organizations cannot be justified on an accommodation rationale.

The Mormon Church argues for a new and different kind of "accommodation": that government should be free to accommodate religious institutions *as such*, by exempting those organizations from general legislation even when they enter the secular world of commerce and even when there is no conflict with religious practice or belief. (C.P.B. Br. 24-25). That thesis has no support in this Court's decisional law, and, we submit, conflicts with the core purpose of the Establishment Clause. For the essence of the neutrality commanded by the Establishment Clause is that government not favor religious institutions *as such*. Where an accommodation does not safeguard religious practice or belief, the type of favoritism the Establishment Clause is designed to forbid is precisely what results from a blanket exemption of religious organizations as such from the duties imposed on all others in the secular commercial world.

The Mormon Church purports to find support for its thesis in *Walz*. But while the Court upheld an exemption for religious institutions, it did so *solely* upon finding that the exemption eliminated a conflict between general legislation and religious *practice*. The property tax exemption at issue in *Walz* did not apply to church property used for secular purposes; it extended *only* to "religious properties used solely for religious worship", 397 U.S. at 666. And the exemption was upheld precisely because the state was accommodating "the exercise of religion" by sparing that exercise from a government-imposed financial burden.

> We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions. [*Id.* at 673].

Even then, the fact that the exemption in *Walz* ran to religious organizations as such—and thus cut closer to the core of Establishment Clause concern than exemptions running to an individual's religious practice—caused this Court to temper its holding in a manner that has not been deemed necessary when upholding accommodations favoring individuals: the Court placed heavy emphasis on the fact that "churches as such" were not "singled out", but rather were bracketed with other nonprofit institutions:

> [New York] has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. [*Id.* at 673].

See also NLRB v. Catholic Bishop, 440 U.S. 490, 518 n.11 (1979) (dissenting opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ.).

In sum, the accommodation doctrine cannot justify *en toto* the sweeping exemption in § 702—which operates

without concern for religious practice or belief—nor can that doctrine justify an exemption on the facts of this case (where the discrimination was not dictated by religious tenet).

It remains true, of course, that there may be instances where a particular religious institution's religious tenets *do* dictate discrimination in secular employment. Whether the government is free to accommodate such tenets by exempting tenet-based employment discrimination in non-religious activities from an otherwise general statutory ban is a question of considerable delicacy. This Court has never addressed in any context the government's power to accommodate the religious beliefs of religious institutions when those institutions choose to enter the secular world as employers. The declaration in *United States v. Lee*, 455 U.S. at 261—"[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity"—suggests that accommodation is more questionable in this context than in the more parochial settings in which it heretofore has been upheld. *Lee* indicates too that an accommodation that enables the religious institution to use its leverage as commercial employer to impose its religious beliefs on its employees is particularly questionable. *See* 455 U.S. at 261. Moreover, the accommodation of the tenets of religious *institutions*, without a concomitant accommodation of the same religious tenets when held by *individual* employers, bespeaks a preference for religious *institutions* (rather than religious beliefs) that impinges on core Establishment Clause concerns.

While we thus believe that the limits of permissible accommodation would be exceeded even by judicially narrowing § 702's exemption to tenet-based discrimination, resolution of this issue ought to await a case in which it

is squarely presented, *viz.*, in which the discrimination at issue is tenet-based.[7] What is important for now is that, whatever the outcome in *such* a case, the accommodation doctrine plainly does not justify the sweeping exemption in § 702 of discrimination by religious institutions *whether or not* that discrimination is based on religious tenet.

C. The Blanket Exemption in § 702 Is Not Justified By Concerns for Avoiding the "Entanglement" Incident To Resolution of Disputes Over Whether Particular Activity is "Religious" and for Providing a "Prophylactic" Against Erroneous Decisionmaking

Appellants assert two related justifications for the expansion of the § 702 exemption, both resting on the point that in its absence the courts would be called upon to determine which activities of religious institutions are "religious" and which are not: first, that the very process of judicial decisionmaking entails a degree of "entanglement" between the government and religious institutions that Congress is free to pretermit by a blanket exemption; and second, that as decisionmaking inevitably carries with it the risk of error, Congress is free to enact a blanket exemption as a prophylactic against erroneous judicial intrusions upon what is truly religious activity.

Although it is doubtful that these concerns were in the mind of the Congress that expanded the § 702 exemption,[8] it cannot be gainsaid that these concerns

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[7] The Court in *Lee* expressly refrained from deciding a somewhat similar accommodation issue, 455 U.S. at 260 n.11.

[8] Both appellants attribute these concerns to Congress, citing statements of Senator Ervin (U.S. Br. 16-17; C.P.B. Br. 26-28). But most of the statements upon which they rely were made by Senator Ervin in support of an earlier proposed amendment—to exempt religious institutions from Title VII entirely—that was overwhelmingly defeated. Moreover, it is clear when those statements are read in context that Senator Ervin was not complaining that line-drawing between secular and religious activities would be

might conceivably have some weight when the focus is on an activity that falls close to the line between religious and secular, and when the answer has not already been derived from an inquiry that Congress directed pursuant to some other federal statute. But as a justification for the blanket exemption in § 702 these concerns fall woefully short. Put another way, that exemption is vastly overbroad if this is the only secular justification that can be offered.

To begin with, for a broad array of commercial enterprises run by religious organizations, the conclusion that the activity is secular and implicates no religious tenets will be crystal clear—indeed, will likely not be contested by the organization. Congress knew full well in 1972 that commercial enterprises of this character abound; indeed, Congress had amended the Internal Revenue Code three years earlier to tax the unrelated business income of churches precisely because this is so. S. Rep. No. 91-552, *supra;* H. Rep. No. 91-413, *supra.* By reason of that amendment to the tax code, while 26 U.S.C. § 501(c)(3) still grants an exemption, *inter alia*, to institutions operated for "religious . . . purposes", 26 U.S.C. § 511(a) imposes a tax on their "unrelated

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entangling or susceptible to error, but that it would be "impossible" because as a theological matter *all* activities of religious organizations are "religious." That theological contention commanded 25 votes; 55 Senators found it unconvincing. 118 Cong. Rec. 1995 (1972). The United States' assertion that as Senator Ervin supported both amendments his statements in support of the one that was defeated are "relevant in ascertaining the purpose of the exemption that was adopted by Congress" (U.S. Br. 16 n.8) is, to say the least, a *non-sequitur.* The lone arguably pertinent statement by Senator Ervin in support of the amendment that was adopted was that its purpose was "to take the political hands of Caesar off the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (1972). We do not presume to guess whether that statement was meant to be an articulation of the concerns about line-drawing advanced by appellants, or a reiteration of Senator Ervin's theological view.

business taxable income," which 26 U.S.C. § 513 defines as that emanating from a

> trade or business the conduct of which is not substantially related (aside from the need of such [religious] organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its . . . purpose or function constituting the basis for its exemption under Section 501 . . .

Every religious institution—or, at least, every such institution that claims a tax exemption for its members' donations—thus identifies annually those of its profit-making enterprises that are not religious in character, as well as a substantial portion of its non-profit activities.[9] At least as to those there is no conceivable "entanglement" or "prophylactic" rationale for an exemption from § 702, and that rationale cannot justify a favoritism toward religious institutions' commercial enterprises that, on its face, cuts into core Establishment Clause values.

To be sure, the tax code may not provide the answer to the "religious" versus "secular" issue as to some non-profit activities of religious institutions.[10] But as to some of these the secular character of the activity will, again, be crystal-clear and not disputed. And as to others the answer will already have been determined because the obligation to comply with other federal employment statutes turns on whether the activity is secular

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[9] The Internal Revenue Service requires that organizations exempt under § 501(c)(3) must file returns respecting "unrelated" activities (apart from certain specifically enumerated activities which are excepted), even though they are non-profit, if such activities have gross receipts of $1,000 or more in the tax year. *See*, IRS Form 990-T and accompanying instructions; IRS Publication 598.

[10] As noted in footnote 9, *supra*, there are some activities excepted from the obligation to report respecting "unrelated" non-profit activities.

rather than religious. *See, e.g.*, 26 U.S.C. § 3309(b)(1)(B) (Federal Unemployment Tax Act); 26 U.S.C. § 203(s) and 29 C.F.R. § 779.214 (1984) (Fair Labor Standards Act). *And see, Tony and Susan Alamo Foundation, supra. See also*, the National Labor Relations Act, 29 U.S.C. §§ 151*ff* [11] and Title VII itself in its prohibition of discrimination based on race, sex and national origin.[12]

Taking into account the full range of federal law on the books there are, accordingly, few activities of religious institutions as to which the line-drawing the § 702 exemption is purportedly designed to obviate has not already been done. And, however large the category of

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[11] The NLRA does not contain any exemption for religious institutions, but the NLRB and the courts have had to distinguish religious from secular activities in order to determine the propriety of NLRA regulation in light of the Religion Clauses. *NLRB v. Catholic Bishop, supra; NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981); *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302 (3rd Cir. 1982); *St. Elizabeth's Community Hospital v. NLRB*, 707 F.2d 1436 (9th Cir. 1983); *Denver Post of the Nat'l Soc'y of the Volunteers of America v. NLRB*, 732 F.2d 769 (10th Cir. 1984); *Volunteers of America-Minnesota v. NLRB*, 752 F.2d 345 (8th Cir.), *cert. denied*, 105 S.Ct. 3502 (1985); *NLRB v. Salvation Army of Mass.*, 763 F.2d 1 (1st Cir. 1985); *Volunteers of America-Los Angeles v. NLRB*, 777 F.2d 1386 (9th Cir. 1985). See also, *Catholic High School Ass'n v. Calvert*, 753 F.2d 1161 (2d Cir. 1985) (state labor relations board).

[12] The situation here is as in the case of the NLRA discussed in the preceding footnote. *See, e.g., McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *EEOC v. Pacific Press Pub. Ass'n.*, 676 F.2d 1272 (9th Cir. 1982); *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *cert. denied*, 106 S.Ct. 3333 (1986); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *Ninth & O Street Baptist Church v. EEOC*, 616 F. Supp. 1231 (W.D.Ky. 1985), *aff'd mem.*, 802 F.2d 459 (6th Cir. 1986).

open cases may be, concerns about line-drawing cannot serve as the rationale for exempting all the *other* activities of religious institutions where the secular character is either undisputed or already established.

If Congress had been genuinely concerned about the marginal cases, it was open to the Legislature to provide safeguards in the statute—in the form of substantive benchmarks, presumptions, requirements that doubts be resolved in favor of the religious institution, limitations on discovery, etc.—to address those concerns. Indeed, this Court in making related decisions under the Religion Clauses has already articulated standards that are particularly sensitive to the interest in non-intrusion by government into religious affairs. The courts resolve cases implicating that interest without becoming "arbiters of scriptural interpretation," *Thomas v. Review Board*, 450 U.S. at 716, by confining their inquiries to the honesty of the claimed conviction, *id.*, and the "objectively ascertainable facts concerning the [] nature and scope" of the activities in question, *Tony and Susan Alamo Foundation*, 471 U.S. at 299.

It is doubtful, therefore, that the concerns for "entanglement" and "prophylaxis" would justify an exemption even for the marginal cases. But however such justifications might fare in determining the validity of a narrowly-drawn statute, there can be no doubt that these all but evanescent concerns do not provide a basis for the wholesale exemption of *all* secular activities of *all* religious institutions from Title VII's ban on employment discrimination. A blanket exemption to religious institutions as such without any secular justification for that exemption in the majority of its applications cannot, we submit, be squared with the Establishment Clause.

CONCLUSION

For the reasons stated above, the Court should declare § 702 as amended unconstitutional insofar as it extends its exemption to activities other than "religious activities".

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-179 and 86-401

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, and THE UNITED STATES OF AMERICA,
Appellants,

vs.

CHRISTINE J. AMOS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH

APPELLEES' MOTION TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF

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APPELLEES' MOTION TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Pursuant to Rules 35 and 42 of the Rules of this Court, appellees move the Court for leave to file the attached Supplemental Brief to bring to the Court's attention an incident which occurred

on March 31, 1987, the day that these appeals were argued, but which is relevant to the Court's consideration of the issues presented.

May 11, 1987.

Respectfully submitted,

ELIZABETH T. DUNNING
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(Counsel of Record)
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UNION, UTAH CHAPTER

JOHN E. HARVEY

Counsel for Appellees

Nos. 86-179 and 86-401

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October Term, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, and THE UNITED STATES OF AMERICA,
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ON APPEAL FROM THE UNITED STATES
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SUPPLEMENTAL BRIEF OF APPELLEES

Appellees file this Supplemental Brief to bring to the Court's attention a recent incident of religious discrimination by a religiously affiliated employer against employees of a hotel

in Tulsa, Oklahoma.

As the attached Affidavit of D. Gregory Bledsoe, Esq., and the exhibits thereto set forth, on or about March 30, 1987, the Oral Roberts Ministries acquired the Ramada Hotel Riverview in Tulsa, Oklahoma, and immediately informed all hotel employees that unless they satisfied certain religious requirements they would be terminated. Mr. Bledsoe represents a former employee of the Ramada Hotel Riverview who was fired on March 31, 1987, for failure to comply with the new religious requirements imposed by the Oral Roberts Ministries.

The Oral Roberts Ministries contends that it is exempt from liability under Title VII for its religious discrimination against the hotel employees by virtue of the exemption contained in section 702 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, as amended, the

constitutionality of which is at issue in this case.

Appellees believe that the Oral Roberts Ministries' purported reliance on the section 702 exemption to justify religious discrimination against employees of a public hotel is significant to the Court's resolution of the issues presented in this case.

May 11, 1987.

Respectfully submitted,

ELIZABETH T. DUNNING
DAVID B. WATKISS
(Counsel of Record)
AMERICAN CIVIL LIBERTIES
UNION, UTAH CHAPTER

JOHN E. HARVEY

Counsel for Appellees

AFFIDAVIT OF

D. GREGORY BLEDSOE

AFFIDAVIT OF D. GREGORY BLEDSOE

STATE OF OKLAHOMA)
: ss.
COUNTY OF TULSA)

D. GREGORY BLEDSOE, of lawful age and being first duly sworn upon his oath, deposes and says:

1. I am a member of the Bars of the State of Oklahoma, the U. S. District Courts for the Northern and Eastern Districts of Oklahoma, and the United States Courts of Appeals for the Tenth Circuit.

2. I am one of counsel for a former employee of the Ramada Hotel Riverview located in Tulsa, Oklahoma, in connection with claims of employment discrimination against her employer. The hotel is, and since its opening in the early 1980's has been, a public accommodation open to and serving the general public in interstate commerce. On or about March 30, 1987, the hotel was acquired

by The Oral Roberts Ministries. (See Exhibit A hereto.) The new owner of the hotel notified all the hotel employees that unless they each signed a statement affirming, inter alia, a belief in "our Lord and Savior, Jesus Christ," they would not continue to be employed. (See Exhibit B hereto.) They also were requested to fill out an "employment application" which included such questions as: "Have you accepted Jesus Christ as your personal Savior and Lord?" and "Do you believe God saves the soul of man?"

3. My client, who was employed in the nonreligious hotel position of Director of Administration (a type of Administrative Assistant to the Hotel Manager), and approximately 14 others who were employed in various hotel positions ranging from jobs in sales, catering and the restaurant to reservations, accounting and maintenance, refused to sign the statement and respond

to the application's religious questions. My client and the other hotel employees who similarly refused to sign, were fired solely because they refused to comply with these newly imposed religious requirements.

4. I am informed by the Oklahoma Human Rights Commission (OHRC) that when The Oral Roberts Ministries was confronted with complaints filed with OHRC regarding its obvious religiously discriminatory termination of these employees, it responded to the OHRC that it was not subject to the jurisdiction of the Commission since it was a "religious corporation" within the meaning of Section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, as amended, and that it is entitled to impose religious requirements on all of its employees, regardless of the nature of its activities and regardless of whether the employees are engaged

in religious activities. The Oral Roberts Ministries also contended that any attempt to enforce the more restrictive Oklahoma statutory exemption of Title 25 O.S. 1981 §1307, which applies only to "religious activities," would be a violation of its "free exercise" rights.

FURTHER AFFIANT SAITH NAUGHT.

/s/ D. Gregory Bledsoe

D. GREGORY BLEDSOE

Subscribed and sworn to before me this 6th day of May, 1987.

/s/ Sandi Elleman
NOTARY PUBLIC

My Commission Expires:

3/25/89

(Seal)

EXHIBIT A

TO

AFFIDAVIT OF D. GREGORY BLEDSOE

TO: Employees of Ramada Hotel Riverview

FROM: Mark W. Swadener, General Manager

DATE: March 30, 1987

The Ramada Hotel Riverview is now under new ownership and management. In the settlement of outstanding litigation issues, title and ownership have been transferred to Oral Roberts Ministries. Employees may remain in current positions and status with regard to pay under the following stipulations:

1) New Applications for Employment must be completed and filed with Oral Roberts Ministries Personnel Dept.
2) The Code of Honor must be understood and signed.
3) Employment will be on a temporary basis. During this temporary period Oral Roberts Ministries'

reserves the right to release an individual without cause.

4) All employees will be on an hourly basis.

It is the intent of Oral Roberts Ministries' to continue to run a first class operation. If there are any questions regarding the facility, either from yourself or the media, please refrain from comment and direct all inquiries to Joel LaCourse or Donna Nicolotti.

With the cooperation of all, the new Riverview Hotel will continue to be a quality Hotel and tremendous success for all.

MWS:vn

EXHIBIT B

TO

AFFIDAVIT OF D. GREGORY BLEDSOE

The Code of Honor Pledge

Oral Roberts Ministries

One of the objectives of the Oral Roberts Ministries is to maintain a Christian religious ministry. Compliance with the life-style is an integral part of its religious ministry.

Recognizing that our Lord and Savior, Jesus Christ, is the Whole Man, it is my aim to follow in His footsteps and to develop in the same ways in which He did: "And Jesus increased in wisdom and stature, and in favour with God and man" (Luke 2:52).

> I pledge, with the help of God, to work diligently toward the ideal of the "whole man."
>
> I will apply myself to my work and endeavor to develop

the full powers of my mind.

I will practice good health habits by regularly participating in wholesome physical activities and abstaining from all illegal drugs, alcoholic beverages, and tobacco products.

I will endeavor to seek the Will of God for my life and to exemplify Christlike character, through my personal prayer life and study of the Word of God, and through faithful group worship.

I will yield my personality to the healing and maturing power of the Holy Spirit and earnestly strive to manifest God's love toward my fellowman by following Christ's example

to "do unto others as I would have them do unto me."

I will abide by the rules and regulations adopted by the Administration of the Oral Roberts Ministries.

I will commit myself to a life-style consistent with the Oral Roberts Ministries Code of Honor Pledge both at work and away from work.

Please study the above statements carefully and prayerfully. Your signature is your acceptance of the Oral Roberts Ministries Code of Honor Pledge, and your commitment, with God's help, to embody the concepts of this pledge into your daily living.

Signed:

_____ _____

Name Date

Nos. 86-179 and 86-401

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ON APPEAL FROM THE UNITED STATES
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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of May, 1987, three copies of the foregoing APPELLEES' MOTION TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF in the above captioned

case were mailed, in envelopes properly addressed and first class postage prepaid, to counsel of record for appellants herein and to the Solicitor General, as follows:

Honorable Charles Fried
Solicitor General
Department of Justice
Washington, D. C. 20530

Wilford W. Kirton
(Counsel of Record)
Kirton, McConkie & Bushnell
330 South 300 East
Salt Lake City, Utah 84111

I further state that all parties required to be served have been served.

DAVID B. WATKISS
310 South Main Street, #1200
Salt Lake City, Utah 84101